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No. 15119

United States
Court of Appeals
for the Ninth Circuit

RAYMOND PERCIFIELD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

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PAUL P. O'BRIEN, C

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For the Appellee.

In the United States District Court for the
District of Nevada

No. 12822

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND PERCIFIELD,

Defendant.

INFORMATION FOR VIOLATION SEC.
145(B), INTERNAL REVENUE CODE OF
1939, TITLE 26, U.S.C. 145(B)

The United States Attorney Charges:

Count One

That on or about the 15th day of March, 1949, at Reno, Nevada, in the District of Nevada, Raymond Percifield, defendant named above, did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue at Reno, Nevada, a false and fraudulent tax return, wherein he stated that his net income for the calender year 1948 was nil, when in fact it was \$14,083.06.

Count Two

That on or about the 15th day of March, 1950, at Reno, Nevada, in the district of Nevada, Raymond

Percifield, defendant named above, did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue at Reno, Nevada, a false and fraudulent tax return, wherein he stated that his net income for the calendar year 1949, was nil, when in fact it was \$6,372.02.

MADISON B. GRAVES,

United States Attorney;

By /s/ STANLEY H. BROWN,

Assistant U. S. Attorney.

[Endorsed]: Filed April 2, 1955.

[Title of District Court and Cause.]

AMENDED INFORMATION FOR VIOLATION
OF SEC. 145(B), INTERNAL REVENUE
CODE OF 1939, TITLE 26, U.S.C. 145(B)

The United States Attorney Charges:

Count One

That on or about the 15th day of March, 1949, in the District of Nevada, Raymond Percifield, late of Rangely, Colorado, who, during the calendar year 1948 was married to Mossie Percifield (did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and

his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada at Reno, Nevada, false and fraudulent joint income tax returns on behalf of himself and his said wife), wherein it was stated in total that their net income for said calendar year was nil and that they had suffered a net loss for said calendar year of \$6,-415.71 and that the amount of tax due and owing thereon was nil, whereas he then and there well knew their joint net income for the said calendar year was the sum of \$13,637.78, upon which said joint net income there was owing to the United States of America an income tax of \$2,041.92.

Count Two

That on or about the 15th day of March, 1950, in the District of Nevada, Raymond Percifield, late of Rangely, Colorado, (did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return), wherein he stated that his net income for said calendar year was nil, that he had suffered a total net loss of \$3,923.07 for said calendar year and that the amount of tax due and owing thereon was nil, whereas he then and there well knew his net income for the said calendar year

was the sum of \$6,372.02, upon which said net income he owed to the United States of America an income tax of \$559.76.

FRANKLIN RITTENHOUSE,
United States Attorney;

By /s/ STANLEY H. BROWN,
Assistant U. S. Attorney.

Sec. 145(b), T. 26 U. S. Code, Internal Revenue Act of 1939.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five (5) years, or both, together with the costs of prosecution.

[Endorsed]: Filed August 17, 1955.

DEFENDANT'S OFFERED INSTRUCTIONS

You are instructed, ladies and gentlemen of the jury, that some evidence has been received as to the good character of the defendant. You will give to

this evidence of good character such weight as you think it is entitled to receive and if after a consideration of all the evidence, facts, and circumstances in the case, including the evidence of good character, you have a reasonable doubt as to whether the defendant is guilty or innocent, then it will be your duty to find the defendant not guilty.

Edgington v. U. S. 164 U. S. 361.

Given: No. 49.

Instruction B

You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the defendant on a given date, followed by proof of a greater net worth on a later date, does not mean that the difference between the two amounts is income.

See generally: Smith v. U. S. 348, U. S. 147.

Refused: Covered by No. 26 and No. 27.

Instruction C

Ladies and gentlemen of the jury it is my duty to say to you that the conclusion has been reached from experience that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth cases in

the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows: Take all of the assets of the taxpayer on a given date which would include all tangible property, cash on hand or in banks, securities, and accounts receivable from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of assets and liabilities and deduct the result thereof from the net worth at the beginning of the period, and the difference could be income but there may be sources which increase net worth that are not taxable and would not be considered income.

See generally: 99 L ed. 170.

Refused: Covered by No. 26 and No. 27.

Instruction D

In a prosecution for evasion of federal income taxes, the taxpayer's wilfulness is an element necessary for conviction; such wilfulness involves a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income.

See Headnote number 23:

Holland v. U. S. 99 L. ed. 154.

Spies v. U. S. 317, U. S. 492.

U. S. v. Lindstrom 222 Fed (2d) 761

(Decided June 3, 1955.)

Given as modified: No. 20.

Instruction E

In this case you are instructed that you ~~cannot~~ infer evil motive because of the failure of the defendant to make a full and complete disclosure to the government agents when asked as to his financial transactions.

U. S. v. Clark, 123 Fed. Supp. 608.

Given as modified: No. 38.

Instruction F

You are instructed that the filing of a return by defendant which understates his true income is unlawful only if made wilfully, with knowledge of its falseness and with intent to evade income taxes, and there is no presumption that may be drawn from the act itself, and both knowledge and wilfulness must be established by independent proof.

~~I will give an example of the application of this rule.~~

~~If a taxpayer honestly and in reality believes that he does not have to report income from a particular~~

~~source, although mistaken in this belief, he would not be guilty of the wilfull attempt to evade payment of income tax.~~

Lurding v. U. S. 179 F. (2d) 419.

Given as modified: No. 39.

Instruction G

Wilfully means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. He [certainly] is not wilfull if he acts without the advice of a lawyer or accountant, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant.

Gaut v. U. S. 184 Fed (2d) 284

cert. den. 340 U. S. 917, 95 L ed 662

71 S. Ct. 350, Reh. den. 340 U. S. 939

95 L ed 678. 71 S. Ct. 488

Given: No. 19.

[Endorsed]: Filed February 21, 1956.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled case, find the defendant, Raymond Percifield, is guilty as charged in the First Count of the Information; and is guilty as charged in the Second Count of the Information.

Dated this 21st day of February, 1956.

/s/ JACK FRANCOVICH,
Foreman.

[Endorsed]: Filed February 21, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant by and through his attorneys of record and moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for judgment of acquittal at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in admitting plaintiff's Exhibit No. 32 in evidence in that there was no evidence adduced of any warning at the time of sign-

ing the said exhibit that it would be used against the defendant in the event of a criminal prosecution; that the testimony of James W. Bell showed that the affidavit was not freely and voluntarily given; that the affidavit includes income for the years 1948, 1949 and 1950 without any segregation whatsoever and as such was highly prejudicial to the defendant in that he was charged with violations only for the years 1948-1949.

5. The Court erred in charging the jury and in refusing to charge the jury as requested in the following respects:

(a) Instruction No. 8 as given by the Court is not the law, is argumentative, uncertain and misleading.

(b) Instruction No. 14 as given by the Court is indefinite, misleading and lays down a rule which would permit the conviction of the defendant of a felony under Section 145(b) on evidence proving or tending to prove a misdemeanor under Section 145(a).

(c) Instruction No. 17 as given by the Court permits conviction of the defendant under Section 145(b), which is a felony on proof of violation of Section 145(a), a misdemeanor, and does not require the wilful attempt to evade taxes to be proved by independent evidence.

(d) The Court erred in modifying defendant's requested Instruction "G" in that defendant's re-

requested instruction correctly stated the law and by the modification the request was rendered conflicting, indefinite and uncertain and emasculated the force and effect of the request.

(e) The Court erred in modifying defendant's requested Instruction "D" in that the modification nullifies the request and by the modification the independent evidence required to prove wilfulness in the request is nullified. The instruction as given does not require independent proof of wilfulness.

(f) Instruction No. 26 as given by the Court is not a correct statement of the law and is indefinite, confusing and misleading.

(g) Instruction No. 27 as given by the Court is not a correct statement of the law and is indefinite, uncertain and misleading.

(h) Instruction No. 29 as given by the Court is not a correct statement of the law and is not adjusted to the evidence in the case as the government proceeded in this case under the hybrid method and therefor is confusing and misleading.

(i) Instruction No. 37 as given by the Court is not adjusted to the evidence in the case, is misleading and allows the jury to convict on evidence establishing nothing more than a misdemeanor and is in conflict with the other instructions requiring proof by independent evidence of wilfulness and further is in conflict with Instruction No. 38.

(j) The Court erred in modifying defendant's requested Instruction "E" in that the modification

destroys the full force and effect of the request and is not adjusted to the evidence in the case and as modified is confusing and misleading.

(k) The Court erred in modifying defendant's requested Instruction "F" in that the modification eliminates as a defense a mistake in law as was contained in defendant's requested Instruction "F."

(l) The Court erred in refusing to give defendant's requested Instructions "B" and "C" in that they are correct statements of the law and are not covered by any other instructions.

6. That as to Count Two the government's computations are erroneous in that the evidence adduced by the government's witnesses was not given full force and effect and the computation as per the schedule attached hereto and made a part hereof there is shown to be no tax due and owing for the year 1949.

Dated this 23rd day of February, A.D. 1956.

LEO J. PUCCINELLI,

Suite 405, Henderson

Bank Bldg., Elko, Nevada;

WALTER H. ANDERSON,

By /s/ LEO J. PUCCINELLI,

One of the Attorneys for
Defendant.

[Endorsed]: Filed February 24, 1956.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
NEW TRIAL

The defendant's motion for new trial came on this day for argument, Stanley H. Brown, Assistant United States Attorney, appearing for the government, and Walter H. Anderson and Leo J. Puccinelli, appearing for the defendant; and the matter being argued and submitted, and good cause appearing, it is

Ordered, that defendant's motion for new trial be, and the same hereby is, denied.

Dated at Carson City, Nevada, this 12th day of March, 1956.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed March 14, 1956.

United States District Court for the
District of Nevada

No. 12,822

UNITED STATES OF AMERICA,

vs.

RAYMOND PERCIFIELD.

JUDGMENT AND ORDER OF PROBATION

Viol. Sec. 145(b), Internal Revenue Code of 1939,
Title 26, U.S.C. 145(b)

On this 16th day of March, 1956, came the attorney for the government and the defendant appeared in person and with counsel, namely, Walter H. Anderson and Leo J. Puccinelli, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of

Count One

On or about the 15th day of March, 1949, in the District of Nevada, defendant named above, late of Rangely, Colorado, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada at Reno, Nevada, false and

fraudulent joint income tax returns on behalf of himself and his said wife.

Count Two

On or about the 15th day of March, 1950, in the District of Nevada, defendant named above, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return.

as charged in the Information and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is sentenced as follows:

Count One

The defendant is fined \$5,000.00 and sentenced to Three (3) Years imprisonment. It Is Ordered that the execution of the imprisonment portion of this sentence is suspended and the defendant is placed on probation for Three (3) Years from this date on the usual conditions of

probation. It Is Further Ordered that the defendant shall report to the Probation Officer on the 1st day of each month during the period of probation, first report is due April 1, 1956. It Is Further Ordered that the defendant shall not engage in or be concerned with any type of activity deemed to be illegal under the laws of any county or state in which he lives.

Count Two

The defendant is fined \$5,000.00 and sentenced to Three (3) Years imprisonment. It Is Ordered that the imprisonment portion of this sentence shall run concurrently with the imprisonment sentence imposed on Count 1. It Is Further Ordered that the execution of the imprisonment portion of this sentence is suspended and the defendant is placed on probation for Three (3) Years from this date under the same terms and conditions as outlined in Count 1 hereof. It Is Further Ordered that of the sum of \$10,000.00 Cash bail now on deposit herein, that the \$5,000.00 shown to have been deposited by defendant be now applied by the clerk on defendant's fine, and that defendant is granted 5 days from this date in which to obtain and file with the clerk authorization of W. D. Fortner to apply his \$5,000.00, now in the Registry Fund, on the defendant's fine.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a

law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise, the defendant may be brought before the Court for a violation of the Court's orders.

It Is Further Ordered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ JOHN R. ROSS,

United States District Judge.

[Seal] OLIVER F. PRATT,
Clerk.

[Endorsed]: Filed March 16, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Raymond Perci-field, Box 185 or c/o Ace High Club, Rangley, Colorado.

Name and address of appellant's attorney: Maurice J. Hindin, Esq., Suite 802, 6399 Wilshire Boulevard, Los Angeles 48, California.

Offense: Violation of Section 145(b), Internal Revenue Code of 1939 (26 U.S.C. 145(b)).

Concise statement of judgment, order and sentence: Judgment of conviction on two (2) counts

after jury trial was entered February 21, 1956. Thereafter, a motion for new trial was duly filed and heard and denied on March 12, 1956. The defendant was sentenced on March 16, 1956. The sentence as to Count 1 was a fine of \$5,000.00 and three-year imprisonment. Execution of the imprisonment was suspended and the defendant placed on probation for a term of three (3) years. Sentence on Count 2 was a fine of \$5,000.00 and three-year imprisonment to run concurrently with sentence given on Count 1. Execution of sentence was suspended and the defendant granted probation for three (3) years, probation period to be concurrent with probation period granted in Count 1.

That as a condition of probation defendant was required to pay the fine imposed by the Court as to each count prior to time allowed for appeal herein. That at the time required for payment of the fine, and at a time prior to filing this notice of appeal, defendant and appellant paid the aforesaid fines in full as a condition of the said judgment and order suspending sentence and placing this defendant on probation.

That as of the date of filing this appeal defendant is not committed to any institution.

I, the above-named defendant, Raymond Percifield, hereby appeal to the United States Court of Appeals, Ninth Circuit, from the judgment of conviction above designated, from the order of the Court denying defendant's motion for new trial,

and from the order and sentence of the Court imposed herein and from the whole of each judgment and order thereof.

Dated March 20, 1956.

/s/ RAYMOND PERCIFIELD,
Defendant and Appellant.

/s/ MAURICE J. HINDIN,
Attorney for Appellant.

[Endorsed]: Filed March 22, 1956.

In the United States District Court
for the District of Nevada

No. 12,822

UNITED STATES OF AMERICA,
Plaintiff,
vs.

RAYMOND PERCIFIELD,
Defendant.

Before: Hon. John R. Ross, Judge.

TRANSCRIPT OF TESTIMONY

February 13 to 21, 1956, Incl.

Be It Remembered, that the above-entitled matter came on for trial before the Court, sitting with a jury, on Monday, the 13th of February, 1956, at Carson City, Nevada, the plaintiff being represented by Stanley H. Brown, Esq., Assistant United States

Attorney; Clyde R. Maxwell, Esq., Trial Counsel, Treasury Department; and the defendant being present in court with his attorneys, Leo J. Puccinelli, Esq., and Walter H. Anderson, Esq. The following proceedings were had:

On Tuesday, February 14, 1956, the jury and alternate juror were sworn. The rule was invoked and witnesses present were sworn and excluded from the courtroom. On stipulation between counsel it was agreed that James W. Bell and Forrest Calkins, witnesses for the government, and Robert S. Hermann, witness for the defendant, might remain in the courtroom during the trial. [1*]

It was stipulated and agreed between counsel for the plaintiff and defendant that the following plaintiff's exhibits be admitted in evidence:

1. Original income tax return of Raymond Percifield for 1948 filed at Reno, Nevada, for the Ace High Club.

2. Original 1948 income tax return of Raymond and Mossie Percifield, filed at Reno, Nevada, for the Nevada Club.

3. Original 1949 income tax return of Raymond Percifield, filed at Reno, Nevada.

4. Certificate of assessment and payment, that is, transcript of the records of the Collector of Internal Revenue, relative to the place the 1948 income tax returns were filed and showing amount of tax, if any, assessed thereon.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

5. Certificate of assessments and payment as to Raymond and Mossie Percifield, for 1949, that is, transcript of Collector's records for income tax paid for that year.

6. Certificate of assessments and payments for 1948 and 1949, being a transcript of the Collector's records at Denver, Colorado, as to Raymond and Mossie Percifield.

7. Deposit slips for Ace High Club account with First State Bank of Rangely, Colorado, for 1948.

8. Deposit slips for Ace High Club account at First State Bank at Rangely for 1949.

9. Photostats and true copies of the records of the First State Bank at Rangely, as to account in name of Raymond and Mossie Percifield and Ace High Club for 1948 and 1949; also ledger sheets of that account.

10. True and correct copies of Findings of Fact and Conclusions of Law in the case of William H. Bacon and wife and R. W. Jackson and wife vs. Raymond Percifield and Mossie Percifield, filed in the District Court of Elko, Nevada. [2]

11. True and correct copy of note for \$11,000 dated Wendover, Nevada, September 26, 1957, referred to in Findings of Fact in Exhibit 10.

12. Photostat copies of 4 checks, referred to in Exhibit 10.

J. LESLIE CARTER

a witness on behalf of the government, having been duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. What is your name, sir?

A. J. Leslie Carter.

Q. And where do you reside?

A. Elko, Nevada.

Q. What is your occupation, sir?

A. Banker.

Q. For what bank?

A. Nevada Bank of Commerce, Elko.

Q. That is the Elko branch?

A. Elko branch.

Q. Now, you were requested to bring certain records of the Elko branch of the Nevada Bank of Commerce, and I believe those records were handed to me prior to the start of this proceeding?

A. Yes, sir.

Q. I wonder if you could tell me just what this first record is?

A. These are deposit slips of Raymond Percifield of Wendover, Utah, during the years 1947, '48, and some of '49.

Q. Are they all the deposit slips for the year 1947, or just the last month of 1947? [3]

A. Just the last month of '47.

Mr. Maxwell: I will offer the document referred

(Testimony of J. Leslie Carter.)

to by the witness into evidence. I think perhaps the clerk should mark that for identification.

The Court: Will you mark the offer for identification.

Mr. Maxwell: If satisfactory with counsel, while they are examining that, I will secure other documents for identification and you then can examine all three documents.

Mr. Anderson: That is all right.

Q. Did you also bring signature card for that account, sir?

A. Yes, sir, I have the signature card.

Mr. Maxwell: I will ask the clerk to mark the signature card for identification.

Q. And did you bring ledger sheets for the bank account, sir?

A. I have certified copies of ledger sheets here.

Q. And you have compared those with your copies of ledger sheets? A. I have.

Q. To what period do those relate?

A. They start in December, '47, and run right on through to '49, to September.

Mr. Maxwell: The clerk will mark the ledger sheets for identification.

Q. Did you also bring with you certain liability ledger sheets? A. Yes, sir.

Q. And to what period does that relate, sir? [4]

A. That is August 31, 1948, to November 17, 1949.

Q. I believe the bottom sheet also refers to June 5, 1948, does it not? A. That is right.

(Testimony of J. Leslie Carter.)

Mr. Maxwell: I ask the clerk to mark these liability ledger sheets as government's next in order.

The Clerk: 16.

Mr. Maxwell: I will offer Plaintiff's Exhibit No. 13 for Identification, being the deposit slips in the account of Raymond Percifield at the Nevada Bank of Commerce at Elko.

Mr. Puccinelli: No objection.

The Court: They may be received in evidence and marked Government's Exhibit 13.

Mr. Maxwell: I will offer Plaintiff's Exhibit No. 15 for Identification into evidence, being certified copies of the ledger sheets of the bank account of Raymond Percifield, Nevada Bank of Commerce, Elko, Nevada, Elko branch.

Mr. Puccinelli: No objection.

The Court: The offer will be received in evidence as Government's Exhibit No. 15.

Mr. Maxwell: There was the signature card, No. 14 for Identification, we have determined not to offer in evidence at this time. I will offer Plaintiff's Exhibit No. 16 for Identification in evidence, it being liability ledger sheets of Raymond Percifield's account with the Elko branch of the Nevada [5] Bank of Commerce at Elko. The period runs from April 10 to June 5, 1948, to the last date, December 17, 1949.

Mr. Puccinelli: No objection.

The Court: The offer is received in evidence and marked Government's Exhibit No. 16.

Q. Mr. Carter, I will hand you Exhibit 16 in

(Testimony of J. Leslie Carter.)

evidence, which has been identified as liability ledger sheets. Would you explain what a liability ledger sheet is?

A. Well, when a person is given a loan, they sign a note and the note is kept track of on a liability ledger sheet.

Q. His payments and interest, etc., are all recorded on the card? A. That is right.

Q. I wonder if you could tell us then what this exhibit reflects, just briefly?

A. Well, it reflects that on June 5, 1948, or April 10, 1948, there was a loan balance of a thousand dollars and on June 5, it tells me that the thousand dollars was renewed and the interest paid at that time and it went on and the note was renewed three consecutive times and then there was \$500 paid on the note and the balance was paid on the note, \$500, December 17, 1949.

Q. I think perhaps you are mistaken as to the loan payment on December 6, 1948. Wasn't there another loan made in 1949?

A. No, there was not.

The Court: I understand, then, that this exhibit shows [6] the history of the payment of principal and interest on a thousand dollar loan, which is indicated in the beginning of that history?

A. That's right.

Q. Which is finally paid off on December 17, 1949? A. Yes, sir.

Mr. Maxwell: I have no further questions.

(Testimony of J. Leslie Carter.)

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Carter, we want to clarify the record we heretofore made and in Plaintiff's Exhibit 16, the opening entry is a thousand dollars on April 10, 1948, is that correct?

A. Yes. That was probably carried forward from a previous loan, if you had the entire ledger sheet.

Q. Now, Mr. Carter, what is the entry as to June 5, 1948? A. Interest.

Q. And what else?

A. A payment of the principal.

Q. Of how much?

A. A thousand dollars.

Q. What is the balance then as of the close of business on June 5, 1948? A. Zero.

Q. Nothing, right? A. Right.

Q. And now in going to the next page, we have what; on the opening [7] entry?

A. A thousand dollar loan on the 31st of August.

Q. Therefore, that can't be the same thousand dollars, can it? A. Certainly not.

Q. That reflects two different one thousand dollar loans? A. Right.

Mr. Puccinelli: I think that is all.

Mr. Maxwell: I have nothing further at this time.

(Witness excused.)

CLIFFORD C. WHITE

having been duly sworn, testified on behalf of the government as follows:

Direct Examination

By Mr. Brown:

Q. Mr. White, for the purpose of the record, would you state your full name?

A. Clifford C. White.

Q. And you have been previously sworn in this matter, have you not? A. Yes, sir.

Q. Where do you reside?

A. Topeka, Kansas.

Q. You have resided there how long?

A. I went back there in the spring of '52.

Q. Where did you reside prior to that time?

A. Gillette, Wyoming.

Q. You appear in court today pursuant to a subpoena, do you not? [8] A. Yes, sir.

Q. And did you bring certain documents with you, also listed on the subpoena?

A. I have all the documents I have, yes, sir.

Q. I wonder if you would produce them, please? Mr. White, are you acquainted with Mr. Raymond Percifield? A. Yes, sir.

Q. Approximately how long have you known him?

A. Oh, I knew him casually prior to '36; about in '36 I became very well acquainted with him.

Q. You do not bear any relationship to him?

A. No, sir.

Q. You recognize him here in court today, do

(Testimony of Clifford C. White.)

you not? A. Yes, sir.

Q. Now, inviting your attention to the summer of 1948, did you have any financial transaction with Mr. Percifield? A. Yes, sir.

Q. Would you kindly explain to the jury and Court just exactly what that transaction was?

A. I loaned him \$2,500.

Q. Now, you have handed me what purports to be a promissory note, executed by Raymond Percifield on July 14, 1948, payable to Clifford C. White, in the amount of \$2,500. Is that sheet evidence of that indebtedness? A. Yes, sir. [9]

Mr. Brown: We would like this marked for identification, plaintiff's next in order.

The Clerk: No. 17.

Q. Now, did you receive any payment on the principal, any reduction of that indebtedness, in the year 1948? Were you paid anything on the principal?

A. Was I paid anything on the principal?

Q. That is correct. A. No, sir.

Q. Did you receive any payment on the principal in the year 1949? A. No, sir.

Q. Now, with regard to the interest, did you receive any interest payment in the year 1948?

A. Well, the interest that I received is down here and I hardly think I did in 1948, sir.

Q. Did you receive any interest in 1949?

A. Well—yes, I did.

Q. How much? A. Seventy-five dollars.

Q. Is that reflected on the reverse of that note?

(Testimony of Clifford C. White.)

A. Yes, sir.

Mr. Brown: We offer the note in evidence, your Honor, as Government's Exhibit 17.

Mr. Anderson: No objection to the offer. [10]

The Court: The offer will be received in evidence as Government's Exhibit 17.

Mr. Brown: You may examine.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. White, I take it, then, from your testimony, that nothing was paid on the principal to you during the years 1948 or 1949? A. No, sir.

Q. I take it your testimony is to the effect that as to the end of 1949 the amount owing to you by Mr. Percifield was \$2,500? A. Yes, sir.

Q. In other words, the face of the note?

A. Yes, sir.

Q. How much does he owe at the present time?

Mr. Brown: We object. There is nothing in issue as to what the indebtedness of the defendant might be at the present time. We are interested in his financial status as of 1948 and 1949 only.

Mr. Puccinelli: Your Honor please, it is our intent to show, among other things——

Mr. Brown: If you are going to make an offer of proof, I suggest that the jury be excused.

The Court: Objection sustained.

Mr. Puccinelli: That will be all.

(Witness excused.) [11]

CORA CRAFT

a witness on behalf of the government, having been duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, Mrs. Craft, would you state your full name?

A. Cora Craft.

Q. You have been previously sworn in this matter, have you not? A. Yes, sir.

Q. Mrs. Craft, where do you reside?

A. Rapid City, South Dakota.

Q. How long have you resided there?

A. About five years.

Q. Your occupation is housewife, is it not?

A. Motel operator.

Q. You appear to testify pursuant to a subpoena caused to be issued by the United States?

A. Yes.

Q. Do you bear any relationship to the defendant, Raymond Percifield?

A. He is my brother-in-law.

Q. He married your sister, is that correct?

A. Yes.

Q. Where did you reside in 1948?

A. Wendover, Utah.

Q. By whom was your husband employed in 1948? [12] A. Raymond Percifield.

Q. In what capacity? A. Bartender.

Q. Now, did you have any transactions with the Percifields in 1948, any financial transactions?

(Testimony of Cora Craft.)

A. With Mossie Percifield.

Q. That is your sister? A. Yes.

Q. Would you explain to the Court and jury just exactly of what that transaction consisted?

A. Well, I loaned her \$3,500.

Q. Now, did you have any understanding as to the purpose of that loan?

A. I think it was to pay a mortgage and payment for something pertaining to the loan.

Q. When you say you think it was payment pertaining to a loan, could you explain more fully?

A. Well, it was an obligation that they had to meet.

Q. When you say "they," to whom do you refer?

A. Well, she and her husband.

Q. And do you recall exactly how that money was paid to Mossie Percifield, whether check or cash?

A. No, it was in cash.

Q. Do you recall if you took a note?

A. She gave me a receipt, made out a receipt. [13]

Q. Did you bring that with you?

A. Yes, I have it.

Q. I wonder if I could see it? A. Yes.

Mr. Brown: I would like to have this marked for identification, Plaintiff's Exhibit No. 18, receipt signed by Mossie Percifield, which indicates on its face receipt of \$3,500 loan, dated September 26, 1948.

Q. Now, referring to Plaintiff's Exhibit No. 18 for identification, which is the receipt you gave me,

(Testimony of Cora Craft.)

Mrs. Craft, is that the only evidence of indebtedness that you received? A. Yes, it is.

Mr. Brown: We offer this in evidence as Plaintiff's Exhibit No. 18.

Mr. Puccinelli: No objection.

The Court: Being no objection, the offer is received in evidence as Government's Exhibit 18.

Q. Now, I ask you if you received any payment on the principal, that is, the \$3,500, reduction of that amount, in the years 1948 or 1949?

A. No, I didn't.

Q. Did you receive any payment of interest in 1948 or 1949? A. No.

Q. Did you have an understanding with Mrs. Percifield or Mr. Percifield, regarding the rate of interest the obligation was to bear? [14]

A. No.

Q. You had no understanding as to interest?

A. None.

Mr. Brown: You may examine.

Mr. Anderson: There is a matter that we want to take up with the Court in connection with the examination, particularly the question asked Mr. White, and we have the same question here of this witness, that as to the present status of this obligation. That might become a very vital issue in this case, as I understand the situation. We would be glad to go into it any time, but we would like to hold Mr. White until that is disposed of.

Mr. Maxwell: I can't see any possible relevancy as to that testimony.

The Court: We will decide this matter now.

(Jury admonished and excused at 2:50 until 3:15 p.m.)

In the Absence of the Jury

The Court: Now, gentlemen, this case involves two counts, for the years 1948 and 1949, and in connection with the transactions between the defendant and certain of these witnesses, wherein it is shown that the indebtedness existed during the years 1948 and '49 between defendant and the witness, defendant's counsel has asked that one of the witnesses what the status of that obligation was at the present time. There was an objection made to that and the Court sustained the objection. Counsel [15] for the defendant have pointed out that similar questions will be asked of other witnesses and indicates they would like to present their views to the Court. Very well.

Mr. Puccinelli: If I may point out to the Court first of all it is unfortunate that my question was the status of the obligation as of this date. The question should have been, and will be in the future, if permitted to be asked, what was the status of the obligation as of the end of 1950? The purpose of that, your Honor please, it is my understanding that any losses made or sustained by the taxpayer in a given year must be carried back before they can be carried forward. If my understanding on that is correct, then this would be very material and vital as to the status of those obligations in 1950, tending

to show that the losses sustained by the defendant might be taken and applied to those years as we requested, and it is for that reason, your Honor, please, that we submit that those questions are relevant and proper.

The Court: Counsel, I assume from your restatement of your question at the present time, that the question you asked the witness, and which the Court ruled upon was properly ruled?

Mr. Puccinelli: In the manner it was presented, yes.

Mr. Maxwell: If the Court please, assuming that the Court desires to accept the question will be properly asked as to [16] losses sustained during the year 1950, I would like to point out to the Court that one never sustains a loss for the year on taxable income until the end of the year. What the defendant may have found out subsequent to December 31, 1950, as to a loss for the year 1950 would hardly have any effect on income tax return that he was required to file on March 15, 1950. Obviously, he could not have known about his 1950 loss at that time, because he would be only less than one-quarter through the year. Secondly, the true tax owing to the government on March 15, 1950, on account of 1949 taxes, would be the full amount, undiminished by carried-back losses. Now that has been held in the case of *In re—187 Fed(a), 62, Ninth Circuit case.* (Reads): Furthermore, another principle of law involved here would be the carry-back of liabilities, losses. *Skeels vs. U. S., 95 Fed. Suppl., 292.* (Reads.)

The Court: This is a splendid opportunity for the Court to become instructed on the intricacies of tax work. The defendant is charged with evading taxes for 1948 and 1949. Assume, during that period I borrowed five thousand dollars from the bank and I did or did not pay any of it off. Now that was the line of questioning being asked of this witness. Now I can see that somewhere what was done during the discussed period is important and I can anticipate what it will lead up to, but whether or not I owed anything to my creditor, [17] to the bank, in the subsequent year, is something that I can't relate to the charges made. How would it affect me? Where would it reflect?

Mr. Puccinelli: In this manner, your Honor please, a person engaged in a particular type of business, or knowing his business well, can, I think, have his thumb on the pulse of that particular business better than some one looking on from the outside. If a person, by March 15th, has already sustained a loss and knows, and firmly believes, he is going to have a bad year, that is entirely within his scope of knowledge.

The Court: How can you bring that out by a question to a witness to whom certain money is owed by the defendant on a straight loan?

Mr. Puccinelli: By this manner, if your Honor please, we are trying to show that there has been a long period of time here in which the defendant has actually not been making money.

The Court: I see, and that these loans are being made to sustain his losses?

Mr. Puccinelli: That is right.

Mr. Brown: Your Honor please, the question is whether he attempted to evade and defeat his taxes for that particular year. If he had the intent at the time that was filed, that is sufficient. Now how could he look forward for a year or two years and tell whether or not he was going to sustain a loss?

The Court: In any event, I will rule it out.

(Recess taken at 3:00 o'clock.) [18]

3:15 P.M.

Defendant present with counsel.

Presence of the jury stipulated.

The Court: Gentlemen, we had some discussion concerning the type of question asked and there need be no point on the question addressed to the first witness because it was addressed as to the status at the present time. I feel that the question asked does not come properly under the head of cross-examination, but by the same token I believe it is admissible under the defendant's case and he can either make this witness, or any other witness, his own on that type of question or to save time we might concede that it be asked on cross-examination. Now this question is confined, as I understand it, to the year in which the return is made physically.

Mr. Puccinelli: Yes.

MRS. CORA CRAFT

resumes the witness stand on

Cross-Examination

By Mr. Anderson:

Mr. Brown: Excuse me, I believe the witness should be subjected to only one examiner.

Mr. Anderson: I concede that, but Mr. Puccinelli said he hadn't asked any questions.

Mr. Brown: Oh, excuse me. [19]

The Court: It is customary for one attorney to handle one phase of the case. Very well, Mr. Anderson.

Q. Mrs. Craft, I will ask you how much Mr. and Mrs. Percifield owed you of this \$3,500 at the end of 1950? A. \$3,500.

Mr. Anderson: That is all.

(Witness excused.)

E. JOSEPH WINDER

having been duly sworn, testified on behalf of the government as follows:

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, state your full name, please. A. E. Joseph Winder.

Q. Mr. Winder, where do you reside?

A. Vernal, Utah.

Q. You have been previously sworn in this matter, have you not? A. Yes, sir.

(Testimony of E. Joseph Winder.)

Q. How long have you resided in Vernal?

A. Practically all my life.

Q. What is your occupation or profession?

A. I am a bookkeeper.

Q. You appear here today pursuant to federal subpoena, do you not? A. Yes, sir.

Q. You were requested to bring certain records with you, is [20] that correct? A. Yes, sir.

Q. And you have them in your possession?

A. Yes, sir.

Q. Do you know Raymond Percifield?

A. Yes, sir.

Q. Do you see him here in court? Do you recognize him? A. Yes, sir.

Q. Where were you employed, sir, in 1949?

A. At the Vernal Motor Sales.

Q. Are you presently employed there?

A. Yes, sir.

Q. In what capacity? A. Bookkeeper.

Q. And were you the bookkeeper for the year 1949? A. Yes, sir.

Q. Briefly, what do your duties consist of?

A. Making entries of sales and disbursements involved, records, submitting reports.

Q. Now, Vernal Motor Sales, what type of business is that?

A. It is a garage, where they sell Buick cars.

Q. Now you, as bookkeeper, were familiar with the books and records kept by the Vernal Motor Sales, isn't that correct? A. Yes, sir.

(Testimony of E. Joseph Winder.)

Q. Those records are available to you, is that correct? [21]

Q. Was it customary in that business to keep either the original or copies of invoices or contracts of clients, contracts relative to the sales of motor vehicles in 1949?

A. It is customary to keep the original of invoices and duplicate of contracts.

Q. Now, inviting your attention to the year 1949, do you have in your possession a car invoice reflecting the sale of an automobile to Raymond Percifield?

A. Yes, sir.

Q. Kindly refer to it if you have it. Does that reflect the sale of a Buick automobile?

A. Yes, sir.

Q. On what date?

A. The contract does not have the date of sale—I should say the invoice does not have the date of sale. The contract shows it was sold the 10th of November, 1949.

Q. What was the make of the automobile?

A. Buick.

Q. What was the price of the automobile?

A. Cash delivered price was \$3,109.80.

Q. Can you tell the Court and jury what that cost includes?

A. Well, the car is priced at \$2,430; transportation \$232, excise tax \$138, and the equipment, consisting of radio \$89.50, heater at \$64.80, whitewall tires \$25.30, seat trim \$52.70, turn lights \$17.50, anti-freeze, two and one-half gallons, \$9.00, water

(Testimony of E. Joseph Winder.)

pump \$1.00, total \$259.80, delivery service was [22] fifty.

Q. And that total cash price is \$3,109.80, is that the figure you testified to? A. Yes, sir.

Q. Now, was there any cash paid on that transaction?

A. Yes, Mr. Percifield gave us his check in the amount of \$448.25.

Q. Was there a turn-in allowance?

A. Yes, sir. He traded in a car, on which we allowed \$609.80.

Q. Do you recall what kind of a car?

A. That was a '46 Buick.

Q. Now, General Motors Acceptance Corporation handles the financing of General Motors cars, is that correct? A. That is right.

Q. Was General Motors Acceptance Corporation involved in this transaction?

A. Yes, we submitted the contract to them for the balance of this purchase price, after deducting the down payment.

Q. What was the total time price?

A. Total time price was \$3,461.87.

Q. What was that figure? A. \$3,461.87.

Q. \$3,461.87? A. Yes, sir.

Q. Now, with reference to the cash, was that payment made by [23] check, do you recall, or was it made by cash; that is, with reference to the amount of money paid by the purchaser, Mr. Percifield?

(Testimony of E. Joseph Winder.)

A. The payment was made by a check.

Q. Did that check clear?

A. No, the check did not clear the bank at the time it was submitted.

Q. Was the down payment made good before the end of 1949? A. Yes, sir.

Q. Do you recall how, or under what circumstances?

A. Well, I know it was redeemed near the end of November, as I recall, by a payment of cash.

Mr. Brown: You may examine.

Mr. Anderson: We would like to see that bill of sale before we let him go. I don't know if we will want him any more than just see it.

Mr. Anderson: Then we will ask him one question.

Cross-Examination

By Mr. Anderson:

Q. The figures you gave, and the evidence you gave, these are all in writing, are they not?

A. Yes, sir.

Q. And you testified from records?

A. Yes, sir. [24]

Q. Could you give that evidence if you did not have the records? From memory? Could you give that evidence from your memory of the transaction?

A. Well, I remember about the sale, but the exact figures I wouldn't have in my memory, no.

Q. You couldn't give them from memory?

(Testimony of E. Joseph Winder.)

A. No.

Q. And you testified from the record you have here?

A. Yes, sir.

Mr. Anderson: In view of that, we move the evidence be stricken because he admitted he is testifying from records and they are not in evidence and he can't testify from memory.

Mr. Brown: I think the motion to strike is certainly untimely. It has been repeatedly upheld by the State of Nevada that a party cannot stand and listen to testimony and then determine whether or not to strike. He should have interposed his objection when I started to examine the witness. There is an additional argument here that he testified he was the bookkeeper and exactly of what his duties consisted. Secondly, it would be a question of refreshing his memory from his books. Nobody can carry these figures around in their head.

The Court: The Court will permit the government to present a little more foundation as to these records from which he testified. [25]

Examination

By Mr. Brown:

Q. Were the records from which you testified kept in the ordinary course of business?

A. Yes.

Q. They were kept by you? A. Yes.

Q. Is it customary, in a business of this nature, to keep records of the type of which you have testified?

A. Yes, sir.

(Testimony of E. Joseph Winder.)

Q. They have been in your custody for how many years?

A. Well, ever since 1949, when the car was bought.

Q. Were the entries made in the records from which you testified your entries?

A. Yes, they are all my entries.

Q. Made at the time of the transactions?

A. Yes, sir.

The Court: Counsel, does this witness have the documents from which he testified?

Mr. Brown: If they want the records—yes, sir, they are in front of him.

The Court: I think the witness has said, in answer to Mr. Anderson, that he couldn't testify from recollection and unless his recollection is refreshed. I think under the circumstances the records should be in evidence. [26]

Mr. Brown: We have no objection.

The Court: I see your point, Counsel. Or if not in evidence, at least they have a right to examine as indicated. Mr. Anderson has a right to look at them.

Cross-Examination

(Continued)

By Mr. Anderson:

Q. Can you tell us what date the check was taken but that was returned for insufficient funds?

A. Well, I believe it was the 29th of November.

Q. What year? A. 1949.

(Testimony of E. Joseph Winder.)

Mr. Anderson: Your Honor please, we would like to have these two documents that the witness produced, one of which is title mortgage and the other this invoice, we would like to have them marked and like to introduce them in evidence.

Mr. Brown: We have no objection.

The Court: Very well. The two documents tendered on the part of the defendant will be received in evidence and marked defendant's Exhibits A and B, invoice A and title mortgage B.

Mr. Anderson: We offer them in evidence as part of the cross-examination of this witness.

The Court: So received.

Mr. Anderson: That is all, your Honor.

(Witness excused.) [27]

DONALD OAKLEY

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. State your name, please.

A. Donald Oakley.

Q. Where do you reside, Mr. Oakley?

A. Reno.

Q. What is your occupation?

A. District Representative for the General Motors Acceptance Corporation.

(Testimony of Donald Oakley.)

Q. And as such representative, you have in your care, custody, and control, their records?

A. To some degree, yes.

Q. You have been subpoenaed here to bring General Motors Acceptance Corporation's records of sale of 1949 Buick to Raymond Percifield, and a contract thereon. Did you bring those records?

A. I have the branch record cards.

Q. Do those records show the amount owed by Raymond Percifield to General Motors Acceptance Corporation as of December 31, 1949?

A. They do.

Q. And what is that amount, sir?

Mr. Anderson: We object to it, because it is evidently in the record and the record is not in evidence.

Mr. Maxwell: I will put the record in evidence and have him read it in the record; I don't see that it makes a bit of difference—if that is the way counsel desire it. [28]

The Court: Put it in, counsel. Let us get along.

Q. This is your branch record, I believe you testified?

A. Yes, sir.

Q. And it shows the payments on this account for the year 1949 and the balance due at the end of the year 1949?

A. Yes.

Mr. Maxwell: May it please the Court, we will offer that document as government's next in order, only as to an item showing the balance of the defendant's account with General Motors Acceptance Corporation at the end of the year 1949.

(Testimony of Donald Oakley.)

Mr. Anderson: We submit if it goes in, it should go in for what it is worth. I may have seen this or not, I don't know.

The Court: Take a look at it.

Mr. Maxwell: I am sure you have, counsel. I showed it to you Tuesday.

Mr. Anderson: We object to it going in at all, unless it goes in for what it shows.

The Court: May the Court see it? These payments all concern this same transaction?

A. That's right.

The Court: I think the objection to the offer is good, and I think if it goes in, it should go in for its face value. It concerns this one transaction only. I observe, counsel, that some of these payments are much later than 1948 and '49. [29]

Mr. Maxwell: Yes, your Honor, I have no objection to the exhibit going in as to full face value as to amounts either due at, or paid during the year 1949. 1950, '51, '52 and '53, or whatever subsequent dates are on there, I do not believe the exhibit is material or relevant.

Mr. Anderson: We do not think they can split an exhibit up and put in a single item and keep the rest from the jury.

The Court: Of course, you are well aware of the fact the jury can be instructed as to the purpose for which testimony is received.

Mr. Anderson: Yes, that is true. And we suggest that the exhibit go in for what it shows on its face, at least up until the end of 1950.

(Testimony of Donald Oakley.)

The Court: Well, that will be the ruling of the Court. This exhibit shows payments made through the calendar year 1950 and the exhibit for that purpose will be admitted as government's Exhibit 19.

Q. Showing you plaintiff's Exhibit No. 19, I wonder if you would read the balance due by the defendant to the General Motors Acceptance Corporation on December 31, 1949? A. \$2,249.67.

Q. There was no balance due on December 31, 1948, of course? A. That's right.

Mr. Maxwell: That will be all. [30]

Cross-Examination

By Mr. Anderson:

Q. On the left-hand side of this exhibit there are some figures, amounts there. What do they represent?

Mr. Maxwell: Just a minute—I object to any testimony with respect to those items unless they are shown to be within the period restricted to the Court's ruling.

Mr. Anderson: The exhibit, I believe, shows what they are. I will ask the witness a question. I first ask what they are. I think I can ask that much.

A. Those represent a shortage which was caused by a check returned by the bank.

Q. Up to what date did that cover?

A. That was covered after the year 1949.

Q. And in the year 1950? A. Yes.

(Testimony of Donald Oakley.)

Q. Was more than one check returned?

A. Yes, sir.

Q. How many in the year 1950?

A. There was a total of four checks, which could be two checks redeposited.

Q. Do you know whether that is the case or not?

A. No, sir, I do not.

Q. And what was the amount of the first check that was returned? A. \$134.09.

Q. Do you know how that was paid? [31]

A. No, sir, I do not.

Q. Has it been paid? A. Yes, sir.

Q. Do you know whether the second check was \$268.18?

A. I could tell from the dates here, sir.

Q. Very well, if you can tell.

A. Well, sir, it was evidently two checks that totalled \$268.18.

Q. Were they both returned, or was only one check? A. It is evidently two checks.

Q. Were more than these two checks returned in the year 1950?

A. There was a total of four checks deposited. I cannot say whether it was two checks or three checks or four checks.

Mr. Anderson: That is all.

Redirect Examination

By Mr. Maxwell:

Q. Those checks were all paid?

A. Yes, sir.

(Testimony of Donald Oakley.)

Q. Were they paid during the year 1950?

A. That's right.

Mr. Maxwell: That's all.

(Witness excused.) [32]

JENNIE ROSA

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name please?

A. Jennie E. Rosa.

Q. Where do you reside?

A. Glenwood Springs, Colorado.

Q. What is your occupation?

A. I am vice-president of the First National Bank of Glenwood.

Q. And in that capacity do you have the car, custody and control of records of that bank?

A. Yes.

Q. You were subpoenaed to bring with you certain documents. Did you bring those documents with you today?

A. Yes, sir.

Q. For the purpose of identification, will you state what this document is, please?

A. It is a note from Raymond Percifield to Joe Rosa.

Q. What is the date?

A. October 1, 1947.

Q. This is a photostat copy of such note, is it?

(Testimony of Jennie Rosa.)

A. Yes.

Q. Have you compared this copy with the original? A. Yes.

Q. As a matter of fact, the photostat bears that certification [33] on top it is a true copy?

A. Yes, it does.

Mr. Maxwell: I ask it be marked for identification.

The Court: It may be so marked.

The Clerk: No. 20 for identification.

Q. Do you know where the original of this photostat is?

A. The original has been returned to Mr. Percifield.

Q. This is Mr. Percifield here—do you know him?

A. Yes, I have just seen him a couple of times.

Mr. Maxwell: I will offer Exhibit 20 for identification in evidence, only as to the amount of payments on the face and the note itself to and including the period December 31, 1949.

Mr. Anderson: We object to this as incompetent, immaterial and irrelevant and not the best evidence.

Mr. Maxwell: If the Court please, I believe Miss Rosa testified first of all she had compared this with the original and it is a true copy, and, second, the original has been returned to the defendant.

The Court: That is correct. If you want to make demand on the defendant.

Mr. Anderson: It is our contention he can't

(Testimony of Jennie Rosa.)

make a demand on the defendant to produce something until he is our witness on the stand.

The Court: I believe you are right, but at least the original is in the defendant's possession and this [34] is a certified copy and if the government can distinguish anything wrong as to what is now offered as the best evidence——

Mr. Anderson: I just want to point out I don't think there is any authority in law for a bank to make a certified copy.

The Court: There may not be. I don't think there is much authority in law for any one to make a certified copy and yet they do. Where do we stand now?

Mr. Maxwell: This offer, your Honor, this note, together with the payments thereon for the period, date of October 1, 1947, to and including December 1, 1949.

Mr. Anderson: We make the further objection, if they are going to offer it at all, they should offer it for what it shows.

The Court: May I see the offer?

Mr. Maxwell: Yes, your Honor.

The Court: The Court feels that the same years should be taken on this as to the year in which the last tax return was made; in short, it was made for 1949 in 1950 and the Court feels that the offer, if it is to be restricted, should include the year 1950.

Mr. Maxwell: Very well.

The Court: With that restriction, counsel, are you—— [35]

(Testimony of Jennie Rosa.)

Mr. Anderson: As far as that part of it is concerned, that is all right.

The Court: Very well. The offer will be received in evidence as government's Exhibit No. 20 and, Mr. Clerk, you will be directed to cover that portion of the exhibit concerned with the more recent years.

Mr. Maxwell: May I suggest the last page shows entirely later years, and that may be detached?

The Court: Do you consent to the last page being detached, which concerns, which concerns itself with 1952, 1953 and 1954?

Mr. Anderson: Yes, that is all right.

The Court: Then, Mr. Clerk, you will cover the first page in the manner indicated by the Court. I hand back to you, counsel, page 2, this being detached as stipulated to may be subtracted from the original offer.

Q. Now, showing you Exhibit 20, Miss Rosa, can you read there the amount of the note?

A. You want me to read?

Q. Yes, would you tell me what the amount of the note is? A. Fifty-five thousand.

Q. I notice in the body of the note it says fifty thousand. Can you look at the payments below the note and tell me which the parties treated it, as fifty thousand or fifty-five thousand? [36]

A. Fifty-five thousand.

Mr. Maxwell: We have no further questions.

(Testimony of Jennie Rosa.)

Cross-Examination

By Mr. Anderson:

Q. Miss Rosa, you say that you returned the original of that note to Mr. Percifield?

A. Yes, I believe so.

Q. Did you do it?

A. No, I did not. It was another employee at the bank.

Q. How do you know that?

A. Well, it is part of our files.

Q. How do you know another employee of the bank returned it?

A. Well, I have this to show, where the last payment was made.

Q. I want to know if you, yourself, returned it?

A. No, I didn't myself return it.

Mr. Maxwell: Do you know it was returned?

A. Yes, I do.

Mr. Maxwell: You know that?

A. Yes.

Q. (By Mr. Anderson): How do you know it?

A. Well, due to the fact it isn't in our files yet.

Q. Is that the only way you know it?

A. No, I can show you by this.

Mr. Maxwell: May the document that the witness is showing counsel be marked for identification?

The Court: Yes, it will be so marked.

The Clerk: No. 21 for identification. [37]

(Testimony of Jennie Rosa.)

Redirect Examination

By Mr. Maxwell:

Q. Miss Rosa, you say this document, having been signed by Mr. Percifield, referring to Exhibit 21 for identification, establishes, as a part of your file, that the original note and assignment were returned to the defendant. I wonder if you would explain that? A. Why?

Q. Yes.

A. Well, we have a regular stamp, "Paid," and the date and releases the bank from all responsibility after he paid this note.

Q. And at that time does the bank return all of the original notes and agreements in escrow file? A. That is correct.

Q. So that this note, then, would have been returned at the time that was signed, is that correct?

A. That is correct. That stamp releases the bank of all responsibility.

Q. What is the date of that?

A. October 4, 1950.

Q. Now, you are referring to what page of Exhibit 21 for identification?

A. The last page.

Q. It is the third page?

A. Third page, that is correct.

Q. And it is on the bottom of that page to the left? [38] A. That is right.

Mr. Maxwell: Now, if the Court please, I will offer the bottom of the third page of Exhibit 21 for identification in evidence.

(Testimony of Jennie Rosa.)

Mr. Anderson: May I take it a moment? May we ask a question on the balance of this document?

Q. (By Mr. Anderson): Are the next two pages attached to this paper part of this same transaction or not, the next two sheets? Do they relate to that same transaction? A. Yes.

Q. Are they part of the same transaction?

A. Yes, the same transaction, that is correct.

Mr. Anderson: If the Court please, the last two pages that we inquired about of this witness on cross-examination are for the year 1950 and we think they should go in, too.

The Court: Now, we have introduced here a certified photostat of a note. Now that served a purpose. Now it appears to me that we are just moving away from the main picture with this sort of discussion. Maybe I am wrong.

Mr. Maxwell: With the Court's ruling in mind, I will withdraw my offer.

The Court: I do not think it adds anything to the evidence.

Mr. Anderson: As to whether he received the original [39] note, I have conferred——

The Court: The offer has been withdrawn. I do not think it would add anything to the matters here.

Mr. Maxwell: I have finished examination of the witness.

Mr. Anderson: I think that is all.

(Witness excused.)

JOE ROSA

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, sir?

A. Joe Rosa.

Q. You have been sworn already, have you not?

A. Yes, sir.

Q. Are you any relation to Miss Jennie Rosa who just testified? A. No.

Q. What is your occupation, sir?

A. I run a restaurant and a bar.

Q. Where is that?

A. Glenwood Springs, Colorado.

Q. What was your occupation during the year 1947? A. I ran a restaurant and a bar.

Q. And where was that?

A. Rangely, Colorado.

Q. What was the name of the restaurant? [40]

A. Ace High.

Q. When did you buy the Ace High Club?

A. I bought it, I think it was around June of '46.

Q. And did you thereafter sell it?

A. Yes.

Q. To whom did you sell it?

A. To Mr. Raymond Percifield.

Q. When was that sale made again, sir?

A. It was in the fall of the year of, I believe, around October, 1947.

(Testimony of Joe Rosa.)

Q. What was the amount of the sale?

A. Seventy thousand dollars.

Q. What did that include?

A. That included all the fixtures, the property and the inventory.

Q. And did you set an amount on the inventories? A. Yes.

Q. How much was that?

A. Thirty-five hundred.

Q. And the balance of the \$70,000 was for the land, building and fixtures? A. That's right.

Q. How much did the land and buildings cost you in 1946?

A. Well, altogether it cost me around forty thousand dollars, in the neighborhood of forty thousand dollars. [40-A]

Q. Does that include the fixtures as well?

A. Yes.

Q. Now, I will show you plaintiff's Exhibit 20 in evidence and ask you if that is not a copy of the note which you received from Mr. Percifield on October 1, 1947, when he purchased the Ace High Club from you? A. Yes.

Q. And the amount of that note is fifty-five thousand dollars? A. That is right.

Q. Then fifteen thousand dollars was paid down by Mr. Percifield to you? A. That's right.

Q. About what was the date of that payment?

A. The fifteen thousand?

Q. Yes.

(Testimony of Joe Rosa.)

A. Fifteen thousand, I think, was at the time we made the sale.

Q. That would be around October 1st?

A. Around about there, the first to the 10th or 12th.

Q. How was that paid to you, in cash or check?

A. I think it was cashier's check.

Q. Now, did that include the inventory payment? A. No.

Q. The inventory payment, then, is still there in the note? A. Yes, it is in the note, yes.

Q. Is that the first payment shown on that [41] note?

A. It should be three thousand five hundred.

Q. Is that the first payment shown on that note?

A. That is right.

Q. And that left a balance of \$51,500?

A. That is correct.

Q. Did you receive payments from Mr. Percifield during the years 1948 and 1949?

A. Well, whatever is on the note here. We received all the payments until—I can't recall the time—until there was a suit of Mr. Percifield against me on the same deal here.

Q. That was later on? A. Later on, yes.

Q. You gave the note to the bank to collect for you? A. That's right.

Q. Now, at the time you sold the Ace High Club, you were operating it yourself immediately prior to that time? A. That's right.

(Testimony of Joe Rosa.)

Q. And was gambling carried on in the premises, Mr. Rosa?

A. I refuse to answer that question, on the ground it might tend to incriminate myself.

Q. Now, you say the club cost you \$40,000 in June of 1946? A. Well——

Q. I mean your total cost?

A. Total cost, yes.

Q. About \$40,000? [42] A. Yes.

Q. And that included the land and buildings?

A. That is right.

Q. And fixtures? A. That's right.

Q. And those were substantially the same fixtures that you sold to Mr. Percifield in October, 1947? A. Yes, I sold everything I had.

Mr. Maxwell: That will be all.

Cross-Examination

By Mr. Anderson:

Q. Now, Mr. Rosa, you say the inventory is represented there on the first payment on the note of \$3,500? A. Yes, sir.

Q. How did you arrive at that inventory?

A. We took inventory and we figured out what it was.

Q. That is, you took inventory of what was on hand? A. Yes.

Q. And it was \$3,500—that is the way you reached it? A. Yes, that's right.

Q. Who did you buy the Ace High Club from?

(Testimony of Joe Rosa.)

A. I bought the Ace High Club from Ace—I have forgotten his last name. His first name was Ace—Alberts, I believe.

Q. And you operated it from that time until you sold it? A. That's right.

Q. Did you do any repairing on it while you had it? [43]

A. I paid \$15,000 for this little cafe that Alberts had and then I built an addition to the club alongside of it.

Q. Then the purchase price from Mr. Alberts wasn't \$40,000?

A. No, it was \$15,000. Altogether it cost me about forty thousand dollars.

Q. Could you describe the building you bought for \$15,000?

A. It wasn't much of a building.

Q. It was what you call a shack?

A. That is right.

Q. And you had that there at that time and then you built around it? A. Yes.

Q. You didn't tear it down?

A. No, I didn't tear it down.

Q. And you built the present building you sold around this shack of Mr. Alberts'?

A. That's right.

Q. And you operated it at that time until the time you sold it? A. That's right.

Q. Did you make any money out of the operation?

(Testimony of Joe Rosa.)

Mr. Maxwell: We object as incompetent, irrelevant and immaterial.

Mr. Anderson: We submit it has a direct bearing, your Honor. Answer the question.

A. No, I lost money. [44]

Q. And you were operating it during the big years of the Rangely boom? A. That's right.

Q. Rangely was a boom oil town?

A. Well, supposed to have been.

Q. And that, you say, was the big years?

A. That's right.

Q. How much money did you lose?

A. Well, I can't tell you, but I think I lost, I lost around four hundred or five hundred dollars in my total operations.

Q. How did you arrive at the \$3,500 inventory in the note? Is there anything in the note itself to indicate that is inventory?

A. The price was \$70,000, including inventories, and we took the inventory before we made the deal and when we were making the deal, and the inventory, it came to \$3,500.

Q. That was included, then, in the \$70,000?

A. That is right.

Q. And the gross sale price of everything was \$70,000? A. That is right.

Q. Whether inventory, good will, or whatever?

A. Well, the inventory, we had that all marked; we took that inventory at that time and that was \$3,500. We took that inventory before he took it.

Q. But after you did take inventory, the gross

(Testimony of Joe Rosa.)

sale price was \$70,000? [45] A. That's right.

Q. Regardless of what it included?

A. Well, we reached an agreement—in other words, we were doing this that way and I wanted \$70,000 plus inventory, and then after we took the inventory, I agreed I would throw the inventory in.

Q. Still \$70,000? A. Yes.

Mr. Anderson: That is all, your Honor.

Redirect Examination

By Mr. Maxwell:

Q. Now, I want to straighten out this \$40,000. Your cost of \$40,000 included your \$15,000 purchase price? A. That is right.

Q. So you added another \$25,000 worth of improvements to the building, is that right?

A. That is right.

Q. What type of improvements did you add there?

A. Well, improvements by way of another two rooms.

Q. What kind of construction?

A. Construction was cement blocks and stucco.

Q. Were they large rooms?

A. Well, I would say they were around 24 by 24.

Q. And then did you add modern fixtures to the place? A. Well, the best I could get.

Q. That all came to about \$25,000? [46]

A. That's right, just about.

Mr. Maxwell: I have no further questions.

(Witness excused.)

(Jury admonished and recess taken at 4:30 p.m.)

February 15, 1956—10:00 A.M.

(Defendant present with counsel and counsel for the government present. Presence of the jury stipulated.)

The Court: Let the record show that this is the third day of the trial in the matter of the United States vs. Raymond Percifield. Ladies and gentlemen of the jury, the Court wishes you good morning, and all of counsel. Following adjournment yesterday a request was made by counsel that certain exhibits be permitted to be withdrawn from the record. Do you have the exhibit numbers on those?

The Clerk: Yes, your Honor, 17 and 18.

The Court: It is the order of the Court that plaintiff's Exhibits 17 and 18 may be withdrawn from the file and true copies thereof substituted in their place and stead.

Mr. Brown: I wish to state, your Honor, that we do not wish to avail ourselves of the benefit of the order until the trial has been completed, at which time we will withdraw them. [47]

The Court: Very well. Then the order will be amended, to the effect that the withdrawal will be after the trial. Now, as I recall, the government was about to call another witness.

Mr. Maxwell: We will recall Mr. Carter.

J. LESLIE CARTER

having been previously sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Mr. Carter, you testified here yesterday, did you not? A. Yes, I did.

Q. And you are the representative of the Nevada Bank of Commerce, Elko Branch, Elko, Nevada? A. Yes, sir.

Q. Now, yesterday you testified about plaintiff's Exhibit 16 in evidence, is that correct?

A. That's right.

Q. And what is that Exhibit 16 again, to refresh our recollection on that?

A. Well, it is evidence of a loan that was made to Mr. Percifield by the Nevada Bank of Commerce.

Q. Now, what is the first date shown on that Exhibit 16? A. April 10, 1948.

Q. Now, have you made subsequent inquiry, since your testimony yesterday of your bank and secured additional records for a date prior to that time? [48] A. I have.

Q. Would you produce those records, sir?

A. Yes, sir, I have them right here.

Mr. Maxwell: I will ask that this document be marked government's next in order for identification.

The Clerk: Exhibit 22.

(Testimony of J. Leslie Carter.)

Q. Mr. Carter, I will ask you to explain what government's Exhibit 22 for identification is?

A. It is a record of liability account for Mr. Percifield in 1947. These records were junked and then they were changed to machine kept records thereafter, and it shows, beginning along in 19——

Q. Let us just simply identify the document there. In other words, that is a liability sheet?

A. Yes, prior years.

Q. And it is for the account of Mr. Percifield?

A. Yes.

Q. And it reflects the amount that Mr. Percifield received from the bank? A. Yes.

Q. And it also reflects loans and repayment of loans during the period January 1, 1948, up through April 10, 1948? A. That's right.

Mr. Maxwell: I will offer Exhibit 22 in evidence, your Honor. [49]

Mr. Puccinelli: No objection.

The Court: The offer will be received in evidence as government's Exhibit 22.

Q. Now, sir, does this document reflect in what amount Mr. Percifield was indebted to the Nevada Bank of Commerce as of December 31, 1947?

A. It does.

Q. And what was that amount?

A. Two thousand dollars.

Q. Does that document show that that amount was subsequently paid?

A. On January 5th that amount was paid and it shows a zero balance.

(Testimony of J. Leslie Carter.)

Q. Was there a subsequent loan taken out by Mr. Percifield?

A. On the same day, January 5, 1948, it shows renewal here, one thousand dollars.

Q. And is that the same amount that is shown on your other liability sheets as due on April 10, 1948? A. That's right.

Q. That is the same loan then? A. Yes.

Q. Are there interest payments shown on that sheet?

A. Yes, the interest was paid on January 5, 1948.

Q. In what amount? A. \$37.67. [50]

Q. When was that original loan of two thousand dollars made? A. September 27, 1947.

Q. Did your bank receive any security?

A. I have a loan report here that goes along with that particular loan, which shows that it was a title mortgage on a 1946 Buick sedan.

Q. When a bank makes loans on automobiles, they generally require the title to be clear or in the name of the person?

A. Well, when they make a loan, they have to have the title certificate in their possession, showing them as the legal owner.

Mr. Maxwell: I have no further questions.

(Testimony of J. Leslie Carter.)

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Carter, what is the normal business practice of your bank—assuming that a person has an account with your bank and a loan is made, what is your normal business practice in making that loan? How is it actually given to the individual?

Mr. Maxwell: Your Honor, I am going to object to this. I have no objection to any testimony as to what was the—the practice in this particular instance, but I think normal business practice, as it exists now, may be completely different from what it was in 1948. Secondly, I think it is asking the witness for his conclusion. I have no objection to any testimony what was the practice in this case.

Mr. Puccinelli: I will amend my question to have it read as such. [51]

Q. What was the business practice in this case, when the loan was made to Mr. Percifield?

A. Not being the manager at that time and just working for the Bank of Commerce, I wouldn't be able to say.

Q. Then let me show you this plaintiff's Exhibit 13 in evidence, which you will recognize as the original deposit slips of Mr. Percifield.

A. Yes.

Q. And I point to sheet No. 3 thereof and ask you if you will state the date that appears at the head of that particular deposit slip?

(Testimony of J. Leslie Carter.)

A. January 5, 1948.

Q. And I will ask you to read the first entry.

A. Note, one thousand dollars.

Q. And that is on January 5, 1948?

A. Right.

Q. One thousand dollars, and it is a note?

A. Yes.

Q. On government's Exhibit 22 on January 5, 1948, the last entry on that particular exhibit, shows how much of the amount of the loan?

A. A thousand dollars.

Q. And it is on the same date as indicated on the note on the deposit slip?

A. Yes. [52]

Mr. Puccinelli: I have no further questions.

Mr. Maxwell: I have no questions.

(Witness excused.)

WILLIAM W. SMITH

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, please?

A. William W. Smith.

A. Gillette, Wyoming.

Q. What is your occupation, sir?

A. Banking.

Q. What bank?

A. Stockmen's Bank.

Q. Where is that located?

(Testimony of William W. Smith.)

A. In Gillette, Wyoming.

Q. You have been asked to bring certain records, relating to accounts of Raymond Percifield and/or Mossie Percifield with your bank? A. Yes.

Q. And you have those records, sir?

A. Yes, I do.

Q. Now, would you tell us what this first sheet is, sir?

A. That is Raymond Percifield's account with our bank for the year '47, up to the time it was closed.

Q. Which is what time?

A. The 8th of June, 1950.

Mr. Maxwell: I ask that the document be marked as the [53] government's next in order, for identification.

The Clerk: 23.

Q. Now, Mr. Smith, you have an additional sheet here. I wonder if you could tell us what that is?

A. That is Mrs. Percifield's account. She had a balance——

Q. I prefer you not read the sheet. Can you tell us exactly what that sheet is?

A. Transcript of her account.

Q. Transcript of her account with the bank. Is the date of this 1948 and 1949?

A. That's right.

Mr. Maxwell: I ask that that be marked for identification.

The Clerk: 24.

(Testimony of William W. Smith.)

Q. Now, referring to Exhibit 23 for identification, Mr. Smith, does that sheet show the balance at the end of the year 1947? A. Yes, sir.

Q. What account is that again?

A. Raymond Percifield.

Q. What is the balance at the end of 1947?

A. \$86.15.

Q. And what was the balance at the end of 1948?

A. The same.

Q. Is that specifically shown on that sheet?

A. No, sir; there was no activity in 1948. [54]

Q. What was the balance at the end of 1949?

A. \$86.15.

Q. Was that specifically shown on that sheet?

A. No, sir; no activity in 1949.

Q. In other words, there is a blank in there and it goes up to what date?

A. The account was closed the 8th of June, 1950.

Q. At that time the entire balance of \$86.15 was withdrawn? A. That's right.

Q. And that balance ran from December 31, 1947? A. Yes.

Q. Now, on Exhibit 24 for identification, does that sheet show the balance at the end of 1947 in the account of Mossie Percifield, I believe that is?

A. Yes.

Q. What is that amount?

A. The end of '47?

Q. The end of '47, December 31st.

A. \$63.11.

Q. Does that show the balance at the end of 1948? A. Yes.

(Testimony of William W. Smith.)

Q. How much is that? A. The same.

Q. Is that specifically shown on this sheet?

A. No, it is not. [55]

Q. That is the same situation as the other exhibit?
A. That is right.

Q. In other words, no activity?

A. No activity.

Q. How about the end of the year 1949?

A. It was the same.

Q. Was there no activity again?

A. No activity.

Q. Is that specifically shown on the sheet?

A. No.

Q. When was the account finally closed out?

A. It has never been closed. It was there the 8th day of February of this year, \$63.11.

Mr. Maxwell: I will offer Exhibits 23 and 24 in evidence.

Mr. Puccinelli: No objection, your Honor.

The Court: The offers will be received in evidence on the part of the government, bearing the same numbers by which they were identified, being plaintiff's Nos. 23 and 24.

Mr. Maxwell: I have no further questions.

Cross-Examination

By Mr. Anderson:

Q. How long, Mr. Smith, have you known Mr. Percifield and Mossie Percifield?

A. Oh, I think about twenty years. [56]

(Testimony of William W. Smith.)

Q. What business was Raymond Percifield in when you first knew him?

Mr. Maxwell: I will object to this, as beyond the scope of direct examination. This man was brought here to produce some bank records. I can't see that Mr. Smith's knowledge of Mr. Percifield, or knowledge of his business has anything to do with direct and in effect would be part of the defendant's case.

The Court: The Court feels the observation rather pertinent, counsel. If you are thinking of making a character witness of Mr. Smith for Mr. Percifield, you may make him your witness. Objection is sustained at this time.

Mr. Anderson: We would ask that this paper be marked as defendant's Exhibit C.

Mr. Maxwell: For identification.

The Court: Yes.

Q. Mr. Smith, I show you what has been marked defendant's Exhibit C for identification and ask you if you know what that is? A. Yes, I do.

Q. What is it?

A. Mossie Percifield's account with the bank for the years 1943, 1944, 1945, up to the present time.

Mr. Maxwell: Now, may it please the Court, I would object to any records of Mossie Percifield at that bank, or any [57] other bank, during the years 1943 on up to and including December 31, 1947.

Mr. Anderson: We haven't offered anything yet.

(Testimony of William W. Smith.)

Mr. Maxwell: I object to any testimony with respect thereto. It is immaterial and irrelevant.

Mr. Anderson: Your Honor, I would like to identify it.

Mr. Maxwell: It has been identified.

Mr. Anderson: Then there is nothing before the Court to submit.

The Court: Gentlemen, let us go along.

Q. I will ask you, is this part of the identical account about which you testified? A. Yes.

Q. And the other sheet of paper which has been offered in evidence? A. Prior today, yes.

Q. That is part of the same account?

A. Yes, sir.

Mr. Anderson: Now, if the Court please, we submit it is admissible. They brought it up. They can't hide the rest from us.

The Court: I see no harm in it.

Mr. Maxwell: Your Honor, may I be heard on the matter for one minute? [58]

The Court: Yes, you may.

Mr. Maxwell: As the Court, of course, recognizes, the only two years with which we are concerned are 1948 and 1949.

The Court: That is correct, counsel, and the jury will be so instructed.

Mr. Maxwell: Yes, your Honor, that I clearly understand and if we admit this transcript that they have, with respect to the years 1943 through 1947 will also be admitted and we will have a record here that may go back twenty-five or thirty years for all

(Testimony of William W. Smith.)

I know. I think that the evidence, at least insofar as the government's case is concerned, shall be confined to two years, and maybe the defendant's case. We shall certainly object strenuously to any evidence outside of two years. Certainly there has been no materiality shown as to 1943 up through 1947. I simply do not believe the record should be cluttered with all these matters.

The Court: Well, it is clear to all of us that out of several years of the defendant's transactions, the government has cut out two years and set them up for tax evasion.

Mr. Maxwell: Yes, your Honor, that is right. Those are the two years he has been indicted for.

The Court: I believe in fairness to the defendant that it is material and relevant not, to use an expression, to pick two years out of the air [59] without a leading up. Now I do not know what counsel has in mind, what proof he may see fit to offer, and I will rule on that when it comes up, but I see no reason why the offer should be rejected and defendant's Exhibit C for identification will be received in evidence and marked defendant's Exhibit C in evidence.

Q. Mr. Smith, showing you defendant's Exhibit C, I will ask you—I believe you have already stated—is that a continuation of the account as shown by government's exhibit of Mossie Percifield?

A. The other exhibit carries it on.

Q. That is what I mean.

A. This is prior to the exhibit.

(Testimony of William W. Smith.)

Q. And the account was opened in 1943?

A. Yes.

Q. Five thousand? A. Five hundred fifty.

Q. What was the most, and on what date, that account ever had?

Mr. Maxwell: I object to that as incompetent, irrelevant and immaterial. The document speaks for itself.

The Court: The witness may answer.

A. \$5,073.17 was the highest balance she had, on February 27, 1946.

Q. And was that withdrawn down to the small balance that is left in one or two checks? [60]

A. In two checks.

Q. What were the amounts of those checks?

A. One check was drawn for \$600 March 6, 1946, and one for \$4,400 April 1, 1946.

Mr. Anderson: That is all we have.

The Court: Any redirect?

Mr. Maxwell: No, your Honor.

The Court: May this witness be excused for the duration of the trial?

Mr. Anderson: No, your Honor, we will want to call him.

The Court: Very well. You will remain in attendance then.

W. D. FORTNER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, will you state your full name, Mr. Fortner?

A. William David Fortner.

Q. And you came into court yesterday and you were sworn by the clerk, were you not?

A. Yes, sir.

Q. Can you hear my questions all right?

A. Yes, sir.

Q. Where do you live? [61]

A. Browder, Montana.

Q. You have lived there how long?

A. About fifteen years, a little over fifteen.

Q. What business are you in up there?

A. Ranching.

Q. Do you know Raymond Percifield?

A. I do.

Q. What relation is he to you?

A. He is my son-in-law.

Q. Married to one of your daughters, is that correct?

A. That's right.

Q. How long have you known him, Mr. Fortner?

A. Oh, I imagine twenty-five years.

Q. Mr. Fortner, did you bring some papers along with you that we requested in our subpoena?

A. I have.

Q. I wonder if I could see those, sir?

(Testimony of W. D. Fortner.)

A. Yes, sir. That is all I have.

Q. Now, for the purpose of identifying that paper that you brought along, what is that, sir?

A. Well, that is the money I loaned him.

Q. When you say "him," who do you mean?

A. Mr. Percifield.

Q. And when you say money you loaned him, what you really mean is evidence of that? [62]

A. Yes.

Q. That isn't the actual money, is it?

A. Oh, no; this is not the actual money.

Q. Do you recall what year that was in?

A. No, I can't recall just what year. I could——

Q. You look at the note, it is all right.

A. No, I just couldn't say just how long this note was given for. It should tell us up there. Unfortunately I have no education, you know, and I am handicapped; I can't read and write, but I know it states here when this note was given.

Mr. Brown: Your Honor please, may I have the Court's and counsel's indulgence to ask leading questions?

The Court: You may, under these conditions.

Q. First of all, how much is the note for?

A. Two thousand dollars.

Q. Isn't there a date on that note?

A. Yes, sir, I guess there is.

Q. You can't tell just exactly what it is?

A. No. It should be there. My banker drewed it up.

Q. You see your signature on there?

(Testimony of W. D. Fortner.)

A. Yes.

Q. Is that your signature?

A. Right here.

Q. Now, is this the instrument that was given to you by Mr. Percifield? [63] A. It was.

Q. Do you recall the circumstances surrounding his giving you this instrument? Wasn't it after you loaned him some money?

A. No. You mean when he borrowed that money?

Q. Yes. Didn't he give you this paper when he borrowed some money?

A. Yes. He wanted to pay off something at Rangely or Wendover, that is what he said.

Q. Then he gave you this when you gave him the money? A. No, he gave me that before.

Q. But it was for the money that you loaned him? A. Yes, sir.

Q. Do you recognize his signature? Do you see it? A. No, I wouldn't.

Mr. Brown: We wish to have marked for identification promissory note dated at Gillette, Wyoming, November 17, 1947, in the amount of two thousand dollars, payable to W. D. Fortner, signed by Raymond Percifield, as government's Exhibit 25 for identification. We offer the note in evidence as plaintiff's next in order.

Mr. Puccinelli: We have no objection.

The Court: The offer will be received in evidence as plaintiff's Exhibit 25.

Q. Now, Mr. Fortner, did you loan money to

(Testimony of W. D. Fortner.)

your son-in-law on just one occasion, or did you loan him money on several occasions? [64]

A. Different occasions.

Q. Now, do you recall ever having received a note for any other amounts about this same time in 1947?

A. Well, I can't. It seems like that some time I received payment on the note for \$140, but I don't know whether it was '47, '48 or when.

Q. Now, referring to this two thousand dollar loan, did you have a banker who helped you with your——

A. Banking business.

Q. Banking business? A. That's right.

Q. Did he keep track of your loans and bank accounts, and so forth and so on?

A. Well, he was supposed to. I left all my papers with him and told him what to do.

Q. Did you keep some cattle for Raymond Perci-field in 1947, '48 and '49?

A. Well, I think it is cattle.

Q. Well, now, on the back of this note it says 7-19-48, paid \$300.

A. Yes.

Q. And then it says, 10-17-49, paid \$500.

A. Yes.

Q. Now, does that bring to mind anything about the cattle?

A. Well, now, that's the year the cattle was closed out and he had the cattle—that is '48? [65]

Q. Three hundred dollars in '48, yes, sir.

A. That is the year the cattle—I believe \$500 in '48.

(Testimony of W. D. Fortner.)

Q. \$560. A. That is '48, too.

Q. No, that is '49. A. Yes.

Q. Now, first of all, I think maybe if we start this way—would you tell the jury and the Court about these cattle that you kept for Raymond Percifield, how many did you have?

A. Well, he bought three cows and two calves.

Q. Was that before you loaned him the money?

A. Well, I believe it was.

Q. And did you keep them on your ranch?

A. Yes, sir.

Q. And did they have some calves?

A. Well, they had two calves the next year.

Q. Did you sell those calves?

A. I sold the first two calves and one dry cow.

Q. You kept the proceeds, the money you got from the sale of those cows, didn't you?

A. Well, I was thinking the most proceeds went to him, I was thinking.

Q. But you are not sure?

A. I am not sure. I know I kept some of it.

Q. You kept some of it to apply on this note, didn't you? [66] A. That's right.

Q. Do you know what Mr. Percifield paid for these cows?

A. Well, I can't just recall just how much, but it wasn't much because it wasn't too good a stock.

Q. Do you know who he bought them from?

A. He bought them from Mr. Chatters sale. I got some at the same time.

Q. That is an auction yard?

(Testimony of W. D. Fortner.)

A. No; we call it a dry farmer's closing out, just an auction sale.

Q. Can you recall approximately how much he paid for them?

A. No, I can't, just offhand. I bought so many cattle off and on I just couldn't say.

Q. Do you remember what cows sold for in '47 and '48? A. No, I can't. A fairly good price.

Q. A good price in those years, wasn't it?

A. But I just can't say the price they brought.

Mr. Brown: That's all right. I think you may inquire.

Cross-Examination

By Mr. Anderson:

Q. Mr. Fortner, I believe Mr. Brown read to you certain payments on the back of the note, one on July 19, 1948, for \$300; then October 17, 1949, paid \$560. Did you understand that when he read that to you? A. Well, I thought I did. [67]

Q. Well, was that payment on the principal or interest? A. No, that was principal.

Q. You thought it was? A. Yes.

Q. Who wrote the payments on there, do you know? A. Mr. Steele.

Q. The banker?

A. He is the banker but he has passed away here about a year ago. Mr. Smith, I guess, he could identify that handwriting.

Q. Have any other payments been made on this note at any time? A. No.

(Testimony of W. D. Fortner.)

Q. You still own the note?

A. I have another one.

Q. Where is the other one?

A. I left it at home.

The Court: May the Court ask a question? You, Mr. Anderson, have probably surrounded what I want to know.

Q. (By the Court): Mr. Fortner, was any payment made on that note, either in actual money or was the only payment that kept from the cattle sales? A. Cattle sales.

Q. (By Mr. Anderson): One other question, Mr. Fortner, please. Did you loan Mr. Percifield any money in 1950?

Mr. Brown: We will object to that, your Honor, on the ground it is irrelevant and immaterial. [68]

The Court: Objection sustained.

Mr. Anderson: We would like to make this observation, your Honor.

The Court: You may.

Mr. Anderson: It is our position, and I think the Court has already gathered, that if there was a loss in 1950, it can be credited back.

The Court: You mean a loss to Mr. Percifield?

Mr. Anderson: Yes. And under the authorities that is a perfectly sound proposition of law.

The Court: I still can't understand how the borrowing of money by Mr. Percifield from this witness would indicate any loss.

Mr. Anderson: The borrowing of money in 1950 would make it have a tendency to establish whether

(Testimony of W. D. Fortner.)

or not he had a loss in 1950. We have some authorities on that proposition.

The Court: I understand the inferences that are possible, but it seems to me they are pretty remote. But the Court has permitted some of the evidence to go beyond the years and I believe that perhaps we will follow that rule throughout the case.

Mr. Maxwell: May I suggest, your Honor, that we have a memorandum of law in the process of being typed and we can submit that at noon and perhaps ruling on this matter could be [69] delayed until that time because Mr. Fortner will probably be here.

The Court: Very well. Let the record show then that the ruling made on the objection to counsel's question on cross-examination, as to whether or not any money was loaned by this witness to the defendant in 1950 will be held in abeyance, subject to the submission of memorandum on the part of government's counsel.

Mr. Anderson: We have no further questions.

Mr. Brown: We have no further questions.

(Jury admonished and recess taken at 11:00 a.m. for 15 minutes.)

11:15 A.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.)

EDWARD A. STROUD

a witness on behalf of the government being duly sworn, testified as follows.

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, state your full name. A. Edward A. Stroud.

Q. Where is your home, sir?

A. Salt Lake City.

Q. And you have resided there for many years?

A. Well, since 1949.

Q. And where is your place of business? [70]

A. 76 West 2nd South, Salt Lake City.

Q. And you have been in business in Salt Lake City since that time? A. Since 1947.

Q. What is the nature of that business?

A. Club, bar equipment.

Q. What is the name of the business?

A. Salt Lake City Card Company.

Q. Did you know Raymond Percifield in 1948 and 1949? A. Yes, sir.

Q. Do you know where he resided?

A. I do not.

Q. Do you know what his business was?

A. No; only I assumed he had a club.

Q. Then you don't actually know?

A. No, I do not.

Q. Did you have any business transactions with Mr. Percifield in 1949? A. Yes.

Q. Did you bring with you certain records that

(Testimony of Edward A. Stroud.)

were requested by the government? A. Yes.

Q. I wonder if I may see you?

A. These two invoices and a shipping tag.

Q. Now, referring to invoice dated September 6, 1949, order No. [71] 79, would you state just generally, for the purpose of identification, what that is?

A. Well, it is 21 layout, plus the freight.

Mr. Anderson: We object at this time——

The Court: The answer may be stricken.

Q. Just generally what is that? Is that an invoice reflecting the sale of certain equipment by you? A. Yes, sir.

Q. What is the number of the invoice?

A. 79.

Q. And what is the date?

A. It is 8-23-49.

Q. And does it reflect a sale to an individual?

A. Well, Raymond Percifield.

Q. What is the little card that is stapled to the invoice?

A. That is what the government gives us at the postoffice. It is on the COD tag.

Q. Is it part of that record?

A. That is what it is on. That is the part they give us to keep when they put the tag on.

Mr. Brown: We would like to have this marked for identification as plaintiff's exhibit next in order.

The Clerk: 26.

Q. Now, with reference to the second exhibit,

(Testimony of Edward A. Stroud.)

what is the order number? [72] A. No. 80.

Q. And it is dated what? A. 8-23-49.

Q. Does it reflect a sale to an individual?

A. Raymond Percifield.

Q. There are certain other documents stapled and attached thereto, what are they?

A. Well, one of them is part of a check stub of the Rangely Truck Line and the other is bill of lading.

Mr. Brown: I ask that this be marked for identification as plaintiff's next in order.

The Clerk: 27.

Q. Now, did I ask you, sir, if you had any business transactions with Mr. Percifield in 1949?

A. Yes, sir.

Q. And your answer was what? A. Yes.

Q. And did I ask you if you sold him certain gambling equipment?

Mr. Anderson: We will object to that, if the Court please, at this time as incompetent, irrelevant and immaterial and tends to prove a separate offense, not related to anything that is involved here.

Mr. Brown: What offense?

The Court: On the face of it, the Court does not see [73] any offense. It refers to the transaction of certain equipment.

Mr. Anderson: He said gambling.

The Court: I know, but I do not know anything about the gambling equipment.

Mr. Anderson: Well, of course, I assumed.

(Testimony of Edward A. Stroud.)

Maybe I am anticipating. This shows shipment to Rangely. I submit it is immaterial at this time, in addition to any other objections.

The Court: Well, it appears to the Court that the exhibits speak for themselves, and they already show what it is, so I see no harm in asking the question.

Mr. Anderson: The exhibits, however, are not in evidence. They have been marked for identification.

The Court: That is right. I thought they were.

Mr. Brown: I intend to lay the foundation for their admission.

Q. Now, do the records reflect sales to Mr. Perci-field? A. Yes.

Q. Were these records made by you or under your direction?

A. It was made by my wife. She does all the book work.

Mr. Brown: Now, we offer the exhibits 26 and 27 into evidence as plaintiff's 26 and 27.

Mr. Anderson: May we ask a question for the purpose of objection? [74]

The Court: Yes, you may, counsel.

Q. (By Mr. Anderson): Mr. Stroud, you say these records were made by your wife?

A. Yes.

Q. Do you have any independent recollection of their making? Did you see them at the time they were made?

A. Well, no, I did not see them. I was in the

(Testimony of Edward A. Stroud.)

back end of the shop probably when they were made in the front.

Q. And that is what you know about it?

A. That's it.

Mr. Anderson: If the Court please, we object to the offer on the ground it is incompetent, irrelevant and immaterial and not sufficient foundation laid.

Mr. Brown: If the Court please, the federal evidence rule, of course, is different from the law rule. We have to establish two facts, that they were done in the ordinary course of business and done either by the party who testified or under his direction or control. That is sufficient to lay the foundation under the federal rule.

The Court: The objection of counsel goes to the fact there was not sufficient foundation laid for the introduction of these two exhibits, marked 26 and 27 for identification. This apparently was a one man and wife business. The Court is of the opinion that the proper foundation was laid and the objection is overruled. The offers made on [75] the part of the government will be admitted in evidence as government's Exhibits 26 and 27.

Q. Now, with reference to Order No. 79, would you explain what the nature of the sale was?

Mr. Anderson: I think we will have to object to that, if the Court please. It is incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in the case.

Mr. Brown: Well, I could have the clerk read

(Testimony of Edward A. Stroud.)

the records which are in evidence. I am simply doing this in the interest of saving time.

The Court: What do you mean by the clerk reading the exhibits in evidence?

Mr. Brown: Take the exhibits before the jury, your Honor.

The Court: You may answer. Objection overruled.

Q. Would you state the nature of the equipment?

A. Well, No. 1 is XO43 black jack, which is plus freight.

Q. What is that?

A. It is a piece of green felt, a little lettering, space as to players who place their bets.

Q. What was the cost?

A. The cost was \$27.50.

Q. What was the second item, sir?

A. The second item was No. H265 layout for crap table.

Q. That is the same thing, isn't it? [76]

A. It is a piece of green felt cloth with designs stencilled on it.

Q. What was the cost? A. \$125.00.

Q. Now, the total was?

A. \$152.50 plus shipping charges.

Q. Now, would you explain the nature of the little ticket that is connected to the invoice?

A. Well, that is if the postoffice uses a COD ticket.

Q. Collect on delivery?

(Testimony of Edward A. Stroud.)

A. Collect on delivery.

Q. Now, with reference to the invoice No. 80, which is the second invoice—excuse me, I forgot to ask you the date of that sale, but I believe I did ask you the date. What was the date of the sale on the first one?

A. Well, you see the date probably of the sale was September 6. The order was 8-23-49 and it was shipped a few days later.

Q. Do you recall what the shipping charges were? What is that first entry there?

A. Well, it is inked, but I imagine it was billed out as \$153.55 less \$152.55.

Q. Now, with reference to the second invoice, would you explain to the Court and the jury what was the sale for? What was the date of that invoice?

A. September 6, 1949. [77]

Q. And what was the first item?

A. One hundred fifty green square edge chips.

Q. What was the denomination of those chips?

A. Denomination of 50 cents.

Q. What was the cost? A. \$28.25.

Q. And the second item, sir?

A. Two thousand white square edge chips.

Q. And the denomination?

A. One dollar.

Q. And the cost? A. \$270.00.

Q. And the third item?

A. Three hundred yellow square edge chips.

Q. The denomination? A. Five dollars.

Q. And the cost? A. \$40.50.

(Testimony of Edward A. Stroud.)

Q. And the last item?

A. Two hundred dark blue square edge chips.

Q. The denomination?

A. Twenty-five dollars.

Q. And the cost? A. \$27.00.

Q. And the total? [78] A. \$357.78.

Q. Now, there is attached to that invoice a bill of lading? A. Yes, sir.

Q. What does that reflect?

A. Well, it reflects the COD of \$357.78.

Q. Consignor?

A. Salt Lake City Card Company.

Q. And it was consigned to Mr. Raymond Perci-field, was it not?

A. It was sent to him, yes, sir.

Q. Where? A. At Rangely, Colorado.

Q. What place? A. Care of Ace High.

Q. There is a check stub attached to that record. Would you explain what that is, please?

A. Well, it is just a stub that we send out with the check.

Q. From the shipper?

A. From the truck lines.

Q. And you receive payment from the truck line? A. Yes, sir.

Q. Of shipments being made COD?

A. Yes, sir.

Mr. Brown: I think that is all.

(Testimony of Edward A. Stroud.)

Cross-Examination

By Mr. Puccinelli:

Q. So I may have my records clear, how do you spell your name? [79] A. S-t-r-o-u-d.

Q. Mr. Stroud, do you have any knowledge as to where this equipment was used, after you sold it?

A. No, sir.

Mr. Puccinelli: I have no further questions.

(Witness excused.)

BLAKE CRAFT

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. State your name, please.

A. Blake Craft.

Q. What is your occupation?

A. Motel operator.

Q. Where do you reside?

A. Rapid City, South Dakota.

Q. You run a motel at Rapid City?

A. Yes, sir.

Q. Do you know the defendant, Raymond Percifield? A. Yes, sir.

Q. Are you any relation to Mr. Percifield?

A. Personally I am not; my wife is.

(Testimony of Blake Craft.)

Q. And what relation?

A. My wife is his wife's sister.

Q. Did you ever work for Mr. Percifield?

A. Yes, sir. [79-A]

Q. When did you work for him?

A. I worked for him the later part of '48, '47, '48 and '49 and into '50.

Q. Where did you work for him, sir?

A. Wendover, Nevada; Rangely, Colorado.

Q. When did you work for him at Wendover, Nevada?

A. The latter part of 1946, '47, '48 and part of '49.

Q. What work did you do, sir?

A. I was bartender.

Q. At the Nevada Club at Wendover?

A. Yes, sir.

Q. Did you have any financial transactions with Mr. Percifield during the years 1948 and 1949?

A. Nothing, except I had him buy me a car.

Q. When was that, sir?

A. That was in July of '48.

Q. Did you pay him the money to buy you this car?

A. No, sir.

Q. Did he pay for the car?

A. Yes, sir; he paid for the car.

Q. Do you know how much he paid for the car?

A. Yes, sir; I do.

Q. Do you have any documents with you to show that?

A. Yes, sir.

Q. Now, you have handed me a sheet of paper

(Testimony of Blake Craft.)

and I wonder if you [80] will explain what that paper is? A. This piece of paper?

Q. Yes, sir. Is this an invoice for that car?

A. Yes, sir; this is an invoice.

Q. And the information on this invoice relates to the car that Mr. Percifield bought for you?

A. Yes, sir.

Mr. Maxwell: I ask that the invoice be marked as government's next in order.

Clerk: 28.

Q. Now, does the invoice reflect the total price of the automobile? A. Yes, sir; it does.

Q. What was that? A. \$2,733.60.

Q. Is the invoice dated? A. Yes, sir.

Q. What is the date? A. July 1, 1948.

Q. And the make of the automobile?

A. It is a Hudson.

Q. What year? A. 1948.

Q. How did it come that you bought this car, sir?

A. Mr. Percifield was down in Colorado and he knew we wanted a [81] new car and he happened to run across these just come in and he asked about them, so he called me up by telephone and told us what they had and he picked out one out of two cars.

Q. And you were in Wendover at that time?

A. Yes.

Q. Then did he buy the car?

A. After I called the bank at Elko to transfer \$2,800 to his account.

Q. From your account?

(Testimony of Blake Craft.)

A. Yes, sir; from my account.

Q. And showing you deposit slip, which is part of plaintiff's Exhibit 13, in evidence, dated 7-6-48, will you read what it says on there?

A. Blake Craft, \$2,800.

Q. Is that about the time you made the transfer from your account to his account?

A. Yes, sir.

Q. Did you or your wife have any financial transactions with Mr. Percifield in 1947?

A. I do not believe so. My wife had some kind of transaction with his wife. I don't know what the date was. I believe it was in 1948.

Q. To refresh your recollection, would you say a loan of \$3,500 was made? A. Yes, sir. [82]

Q. Was that loan made to Mrs. Percifield?

A. To Mrs. Percifield.

Q. Do you know whether or not it was for the use of Mr. Percifield?

A. Yes; I think it was on account of a business obligation.

Mr. Maxwell: I will offer in evidence Exhibit No. 28 for identification.

Mr. Anderson: There is no objection.

The Court: The offer is received in evidence as government's Exhibit No. 28.

Q. Mr. Craft, you say you transferred \$2800 to Mr. Percifield? A. Yes, sir.

Q. And the price of the car was \$2,733.60?

A. Yes, sir.

Q. Did you ever get the \$66.40 back?

(Testimony of Blake Craft.)

A. No, sir; I think that was for expenses.

Q. And perhaps the telephone call he made to you?

A. Could have been; yes, sir.

Mr. Maxwell: That will be all.

Cross-Examination

By Mr. Anderson:

Q. You say the loan that your wife made was to pay for some business obligation?

A. I think so, sir.

Q. Mr. Percifield's business obligation? [83]

A. I believe so.

Q. And this car deal that you had with Mr. Percifield, you put the money in the bank and he drew a check on the account?

A. Yes, sir.

Q. That is all there was to it?

A. Yes, sir.

Q. You had some other financial transaction while you were working for him; he owed you, up to 1950, some money for the balance of wages?

Mr. Maxwell: We object to that as a leading and suggestive question.

Mr. Maxwell: This man happens to be the brother-in-law of the defendant.

Mr. Anderson: We didn't bring him here; you did.

The Court: Well, the question is certainly leading under the circumstances. I don't recall this witness being asked on direct anything about further transactions. Read the question.

(Question read.)

(Testimony of Blake Craft.)

The Court: You may answer.

A. Yes, sir; he owed me six or seven hundred or seven fifty; I don't remember exactly.

Q. That is while you were working for him?

A. Yes, sir.

Q. What year was it that that balance of wages is still owing [84] for work you did? What year did you do the work in?

A. It was the latter part of '49 and the first part of 1950.

Mr. Anderson: That is all.

Redirect Examination

By Mr. Maxwell:

Q. Now, you didn't loan Mr. Percifield any monies in connection with this? A. No, sir.

Q. This amount of money that you say was due you for wages for 1949 and 1950——

A. No, sir.

Q. ——wasn't advanced to Mr. Percifield?

A. No, sir.

Q. You just simply didn't draw on your wages?

A. That's right.

Mr. Maxwell: That's all.

Recross-Examination

By Mr. Anderson:

Q. Mr. Craft, do you know if these wages were reported on social security? A. Yes, sir.

(Testimony of Blake Craft.)

Q. They were?

A. Six hundred dollars; that I know.

Mr. Anderson: That's all.

Redirect Examination

By Mr. Maxwell:

Q. Did you report these wages for social security?

A. I wrote down and got from my withholding statement and I turned it in with my [85] withholding.

Q. Did you pay taxes on those wages?

A. Taxes was paid, yes.

Q. For what year? A. 1949, I believe.

Q. How about 1950? A. I don't know.

Mr. Maxwell: That's all.

(Witness excused.)

(Jury admonished and noon recess taken at 11:50.)

February 15, 1956—1:30 P.M.

(Defendant present with counsel and government counsel present. Jury absent.)

The Court: Gentlemen, there has been some confusion on the part of the Court as to how far it should go in permitting the admission of certain testimony beyond the two years in question. I realize that there are rather strong arguments both

ways. I thought I would just take this moment or two to give you the benefit of my confusion, if I use the word rightly. You may give me some help and it might expedite the matter of continued trial. I realize, of course, that the government is only concerned with testimony of two years, '48 and '49, but by virtue of that I can't convince myself that the defendant is similarly confined. [86] Now, I have been presented a memorandum by government counsel, I have not had an opportunity to read and I assume it is on point.

Mr. Maxwell: In part; yes, your Honor.

The Court: Do counsel have the benefit of a copy of it?

Mr. Anderson: Yes.

The Court: If counsel desire to submit anything to the Court on the point, they may; but it appears to me that there are some practical considerations to be taken in this type of action and from a practical standpoint I can see where, if a series of years are taken out of a man's or woman's business experience or their life and there is an absolute cut-off on each end, there may be a terrific showing of taxable income. It may be true over the period sales have been made of a lifetime's accumulations. Now, it is true the defendant has a right to make his case; and yet, as some of these recent decisions have intimated, figures have a way of taking unto themselves the weight of evidence; and so, if I am confined, or say rather not permitted, to come in and show my 1949 bank account and 1950, where I might start with nothing and end [87] with nothing, I am left

with a terrific unusual condition for the years the government chooses, which naturally gives rise to certain inferences that may not be refuted; and I feel, as far as the defendant is concerned, he is entitled to show the cutting-off of this period on both ends, in fairness to him. By that I do not mean to indicate to you—counsel for the government, I think, understand—that they are to show anything more than the two years; but I do not think they have a right, say, to prepare a scopic slide and put it under a microscope. That is why I have permitted these questions which elicit further information on the part of defendant's counsel on the fringe edge. Now, I believe, as a matter of academic procedure, that I could have required—perhaps should—that the defendant make the witness his own for that purpose, because really it is a part of his case, but waiving academic considerations aside, I think we will proceed faster in this way. Now, if counsel for the government feel that the Court is, in effect, permitting the defendant, under the guise of cross-examination, to make the witness his own, the government [88] may ask the right to cross-examine him on that basis and this Court will permit it. I think it makes faster time this way than if I stopped and kept the witness here two or three days. I just say this, gentlemen, in explanation how I am approaching it. As I said, I am frankly just a bit confused; but I do know this, that all of the recent cases have indicated that a defendant often finds himself in a position it is difficult to explain; and in fairness to this defendant, until the Court sees some

authority to the contrary, I am going to permit the defendant to make that showing, having in mind the expression, "But for the grace of God, there go I."

1:50 P.M.

(Jury returned into court. Presence of the jury stipulated.)

ROBERT J. MAY

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. State your full name. A. Robert J. May.

Q. What is your occupation?

A. I am a dentist.

Q. Where do you reside? [89]

A. Rangely, Colorado.

Q. Did you reside in Rangely, Colorado, in 1948?

A. Yes, sir.

Q. Do you know the defendant in this action, Raymond Percifield? A. Yes, sir.

Q. Are you familiar with his place of business at the Ace High Club in Rangely, Colorado?

A. Yes, sir.

Q. Did you go to the Ace High Club at any time during the year, 1948? A. Yes, sir.

Q. What did you observe on the premises?

A. The usual casino entertainment.

Q. Did you see any gaming? A. Yes, sir.

(Testimony of Robert J. May.)

Q. What kind of gaming did you see?

Mr. Anderson: I think we will object to that, as incompetent, irrelevant and immaterial.

Mr. Maxwell: Well, may it please the Court, we do not feel that this is irrelevant or immaterial at all. It is part of the government's proof to show the defendant was in a business. We expect to show by this witness that, besides being in the bar business and restaurant business, he was in the gambling business and we expect to show that by several other witnesses, I might add. [90]

The Court: Objection overruled.

Q. What type of gaming or gambling did you see on the premises?

A. Poker, blackjack, slot machines.

Q. Was there a dice or crap game there?

A. Yes.

Q. And how often did you go into the club and observe these activities during the year 1948?

A. Oh, once or twice a month possibly.

Q. Who was running the gambling games there?

A. Mr. Percifield.

Q. Did he handle the money in the games?

A. Sometimes.

Q. Would he run the games? A. At times.

The Court: I might add, would he act as dealer?

A. Yes.

Q. Mr. May, you say you were a dentist there in Rangely? A. Yes.

Q. Did you continue to be simply a dentist from the year 1948—did you hold public office, also?

(Testimony of Robert J. May.)

A. Yes, I was Justice of the Peace.

Q. When did you take office as Justice of the Peace? A. In November, 1948.

Q. Were you Justice of the Peace in 1949 as well? A. Yes, sir.

Mr. Maxwell: That's all. [91]

Cross-Examination

By Mr. Anderson:

Q. Dr. May, when, in 1948, did you go in Mr. Percifield's place of business the first time?

A. Well, I was always in and out of there, once or twice a month.

Q. When did you go in the first time?

A. In 1948?

Q. Yes.

A. As I recall, possibly in January.

Q. You went in once or twice in January?

A. Yes, sir.

Q. When did you next go in?

A. Oh, I don't know.

Q. You don't know when you went in?

A. It was a common practice to drop in once or twice a month.

Q. Well, did you hang around there?

A. Evenings sometimes; yes, sir.

Q. That was sort of a place where you spent your evenings?

A. No, sir; just now and then.

(Testimony of Robert J. May.)

Q. Well, what was the occasion of your going in?

A. Oh, usually for a drink or for entertainment.

Q. Was that true in 1949? A. No, sir.

Q. Didn't you go in, in 1949?

A. No, sir. [92]

Q. You weren't in there at all in 1949?

A. In the bar; yes.

Q. This gaming you saw, was that in the same room with the bar? A. No, sir.

Q. Were the slot machines you saw in the same room with the bar? A. Sometimes.

Q. Were they in there in 1949, when you went in there? A. Yes, sir.

Q. Did you take any action at that time, when you were Justice of the Peace?

A. I couldn't take any.

Q. You couldn't take any? A. No, sir.

Mr. Anderson: That's all.

Mr. Maxwell: That's all.

(Witness excused.)

Mr. Brown: Your Honor please, this morning we excused Mr. Smith and the defendant requested that he remain. May the record show that he has been released by the plaintiff?

The Court: Very well, the record will so show.

JAMES L. LOCKETT

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. For the purpose of the record, would you state your full name? [93]

A. James L. Lockett.

Q. You have been previously sworn in this case?

A. That is right.

Q. Where do you reside, Mr. Lockett?

A. Rangely, Colorado.

Q. You have resided there how long?

A. Since 1947.

Q. You are acquainted with Raymond Percifield, are you not?

A. Yes, sir.

Q. Do you see him present, here in the courtroom?

A. I do.

Q. What is your occupation?

A. Tire contractor.

Q. You say you resided in Rangely in 1948 and 1949?

A. Yes, sir.

Q. Were you familiar with the Ace High Club?

A. Yes, sir.

Q. Would you kindly explain, or rather describe, the Ace High Club to the Court and jury?

A. The Ace High Club is a cafe and bar, like you have what I have seen in Nevada.

Q. Just a cafe and bar?

A. Yes, sir.

Q. Was there any gambling operated there?

(Testimony of James L. Lockett.)

Mr. Anderson: May it be understood our objection goes [94] to this whole line of examination?

The Court: Yes, it will be so understood. The record will so show. Answer the question.

Q. Was there gambling activity there?

A. Well, I have seen it; yes.

Q. In what years?

A. I believe in '48 and '49.

Q. How often did you go to the **Ace High Club**?

A. I used to eat there.

Q. How often?

A. I was in there probably daily.

Q. During 1948 and '49? A. That's right.

Q. Did you observe gambling there at all times during that time?

A. I don't know about the gambling for sure at all times. I did eat there.

Q. When you say gambling, what do you mean?

A. I don't know how to answer that question.

Q. Describe the games of chance you saw in the **Ace High Club** in 1948 and 1949.

A. I have played twenty-one and also shot dice.

Q. Did you ever see poker?

A. No; I didn't pay any attention. I don't care for poker.

Q. Did you see any slot machines?

A. Yes; I have seen slot machines. [95]

Q. You have seen slot machines?

A. Yes, sir.

Q. During 1948 and '49? A. Yes, sir.

(Testimony of James L. Lockett.)

Q. Did you have occasion to observe Mr. Percifield in the club in 1948 and 1949? A. Yes, sir.

Q. In what capacity? A. Operator.

Q. Who was running the games?

A. Different people.

Q. For instance?

A. Well, Mr. Percifield was one of them. I don't recall the names personally; I don't remember the names.

Q. There were other people operating the games? A. Yes, sir.

Q. You lived there how long?

A. Since 1946.

Q. And you went there daily, and you don't know the names of the other people who operated the games there; is that correct?

A. Yes, sir; that is correct.

Q. You observed Mr. Percifield banking the games there?

A. I don't know what you mean by banking.

Q. Did you ever see him handle large sums of money? A. I have seen him dealing. [96]

Q. Did you see him handling any large sums of money out of his pocket or out of a box or out of a safe?

A. No, sir; not out of a safe. I have seen him pay off on a table.

Q. You are sure you can't remember the names of anybody else who operated a game in the Ace High Club, during the period?

Mr. Anderson: We object to that, if the Court please, as being leading.

The Court: Objection sustained.

Mr. Maxwell: You may examine.

Mr. Puccinelli: No questions.

(Witness excused.)

WILLIAM B. BEEMER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Beemer, would you state your full name, please? A. William B. Beemer.

Q. Where do you live?

A. Rangely, Colorado.

Q. How long have you lived in Rangely?

A. Approximately ten years.

Q. You are acquainted with Raymond Percifield? A. Yes.

Q. Do you see him here in the courtroom?

A. Yes. [97]

Q. How long have you known him?

A. About eight or nine years.

Q. You resided in Rangely then, in 1948 and 1949; is that right? A. Yes.

Q. Did you know Raymond Percifield there, at that time? A. Yes.

Q. Are you familiar with the place known as the Ace High Club in Rangely? A. Yes.

(Testimony of William B. Beemer.)

Q. Will you describe it, please?

A. Oh, it is a nice club for a small town. It is—do you want the dimensions of the room?

Q. Well, just generally describe the premises, to the best of your ability.

A. It has a bar, dancing establishment, meals.

Q. Do they conduct gambling there? Was gambling conducted there, in 1948 and '49?

A. Some; yes.

Q. Did you observe it yourself? A. Yes.

Q. What type of games did you observe?

A. Well, at that time I would say black jack and poker.

Q. Did you observe any craps?

A. I can't say for sure.

Q. Did you see any slot machines, to the best of your recollection? [98]

A. I believe I would say no to that.

Q. Did you have occasion to observe Mr. Perei-field there dealing or banking those games during those years? A. Yes.

Mr. Brown: I think that is all.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Beemer, if I understood your testimony correctly, I heard you to say, in response to a question propounded by Mr. Brown, that you saw some gambling there in the Ace High Club. I think that was your answer, substantially to that effect?

(Testimony of William B. Beemer.)

A. Yes.

Q. Could you tell me whether or not gambling was conducted there continuously, during 1948?

A. 'I don't think so.

Q. In other words, there would be periods of time when there was no gambling there, is that right?

A. To the best of my recollection; yes.

Q. Was that also true during 1949?

A. Yes.

Mr. Puccinelli: That is all.

Redirect Examination

By Mr. Brown:

Q. How often did you go to the club?

A. Oh, every few days.

Mr. Brown: That is all.

(Witness excused.) [99]

DONALD C. RIDER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. State your name, please?

A. Donald C. Rider.

Q. Where do you reside?

A. Rangely, Colorado.

Q. What is your occupation?

(Testimony of Donald C. Rider.)

A. I am town administrator.

Q. How long have you lived in Rangely?

A. Since April of 1955.

Q. As town administrator, do you have custody and control of the records of the town of Rangely?

A. I do.

Q. You were asked to bring certain of those records here by the subpoena; did you bring those records with you? A. I did.

Q. May I see those records? Now, did you also, at my request, abstract certain entries from the records of the town of Rangely? A. I did.

Q. What did you abstract, as the general nature of things?

A. The amounts contributed by Raymond Perci-field, for the Ace High Club, to the town of Rangely, in 1948 and 1949.

Q. Do your records reflect such contributions?

A. They do. [100]

Q. Do your records reflect whether those contributions were compulsory or to purchase business licenses or simply donations?

Mr. Anderson: We object to that for two reasons; first, it is leading and suggestive; and second, the records will be the best evidence. The witness has testified he wasn't there at the time.

Mr. Maxwell: If the Court please, I have been attempting to lay the foundation for the admission of the abstract that the witness has prepared. The witness has requested that this town of Rangely be

(Testimony of Donald C. Rider.)

permitted to retain their records. I think this is a reasonable request. If I can get the witness to testify as to the amounts on the records that he has made an abstract of, I would like to place that abstract in the record.

The Court: You may proceed. Any objection, counsel?

Mr. Anderson: Yes. That isn't what he asked. He asked whether he was forced or compelled to contribute or voluntarily made. I do not think that had a bearing on the abstract.

Mr. Maxwell: I withdraw the question.

The Court: The question is withdrawn. There will be no ruling.

Q. How are these amounts reflected in the record as donations? A. The amounts——

Mr. Anderson: I object to the witness reading from the record until it is put in evidence.

The Court: I think, counsel, you should continue with the foundation, or if you think you have [101] established sufficient foundation, make your offer.

Q. Were these records which you have brought from the town of Rangely, were they kept in the ordinary course of municipal affairs?

A. They were. They were cash receipts of the town of Rangely.

Q. And they have been turned over to you in your line of succession as town administrator?

A. That is correct.

Q. As regular records of the town of Rangely?

(Testimony of Donald C. Rider.)

A. That is correct.

Q. And you have prepared an abstract of certain entries from those records? A. I have.

Q. And you have handed them to me?

A. Yes.

Mr. Maxwell: I will ask that they be marked for identification.

The Clerk: 29 for identification.

Q. What is the general nature of the entries which you have abstracted, Exhibit 29 for identification?

A. The one side of the entry shows the amounts that were paid or contributed to the town of Rangely. The other side the purpose or account to which they were credited. Accounts to which they were credited are donation fees, license fees, dog licenses.

Q. That abstract, however, is taken from the books of the town [102] of Rangely?

A. That is correct.

Q. Have you put down all the entries related to these items during the years 1948 and 1949?

A. I have.

Q. That show in the books of the town?

A. That is correct.

Mr. Maxwell: At this time I will offer plaintiff's Exhibit 29 for identification in evidence.

Mr. Anderson: No objection.

The Court: The offer is received in evidence as government's Exhibit No. 29.

(Testimony of Donald C. Rider.)

Q. What were the amounts under donations? Where did they finally go in the funds of the town?

A. It was paid into the general fund of the town of Rangely, which is for almost all purposes of the town, fire protection, police protection, health sanitation.

Q. Salary of officers? A. That is right.

Q. Is there anything that that general fund does not cover?

A. There are two that the general fund does not cover; one is the water fund, which is a separate fund, and the other is the service fund.

Mr. Maxwell: You may inquire. [103]

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Rider, does this Exhibit 29 reflect all of the transactions relative to Mr. Percifield for the years 1948 and 1949?

A. It reflects all transactions I have been able to find records for.

Q. I believe you testified that this last item under donations that includes, also, fire and water protection? A. It did not include water.

Mr. Puccinelli: That is all.

(Testimony of Donald C. Rider.)

Redirect Examination

By Mr. Maxwell:

Q. The donations were not compulsory, they were not the same as taxes?

Mr. Anderson: Objected to because this witness was not there and he does not know whether it was compulsory or not. I don't see how he could know.

Q. On your books, is this donation account in the same category as taxes? A. No.

Q. The donations then here are not taxes paid?

A. No.

Mr. Anderson: I move that the answer be stricken and the question, because the books would be the best evidence. He is asking what is on the books, not here.

The Court: I do not think there is any question in the minds of all of us there is a difference [104] between donations and taxes. To that extent the exhibit does speak for itself.

Mr. Maxwell: I withdraw the question. No further questions.

(Witness excused.)

WILLIAM LEHMAN

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Please state your name, sir.

A. William Lehman.

(Testimony of William Lehman.)

Q. Where do you reside, Mr. Lehman?

A. Kansas City.

Q. In 1949 where did you reside?

A. September of 1949 I lived in Rangely, Colorado.

Q. During the period September, 1949, to December 31, 1949, did you visit the Ace High Club at Rangely, Colorado? A. Yes.

Q. Would you describe the premises for us, please?

A. Well, it was a bar and cafe and dance floor. The building was located on the main street.

Q. Pretty much in the middle of town; was it not?

A. Yes; about two blocks from the middle of town.

Q. Did you see on the premises, in addition to the bar and dance hall, a room which was used for the purpose of gambling? A. Yes.

Q. Was that a large room? [105]

A. No; not a large room. I would say about 25 feet square.

Q. What gambling equipment was located in this room during the time September, 1949, to December 31, 1949? A. I recall a crap table; twenty-one.

Q. Was there a poker table?

A. I am not positive of that.

Q. Were any slot machines there? A. Yes.

Q. How often were you in the Ace High Club and in the gaming room in the period September to December, 1949?

(Testimony of William Lehman.)

A. Oh, I would say occasionally, possibly once a week.

Q. On these visits, did you observe gambling going on there? A. Yes; occasionally.

Q. Would you say that was every time you went there?

A. Probably not, because I was pretty busy—oh, during the day, in connection with business, when I was down there, I didn't.

Q. What was your business at that time?

A. Newspaper work.

Q. When was gambling ordinarily carried on, at what time of day?

A. I would recall mostly in the evening.

Q. Did you see Mr. Percifield at these games?

A. I did.

Q. Was he banking, running the games?

A. Yes; occasionally.

Q. Someone else would occasionally be [106] there? A. Yes; there were other people there.

Q. Do you remember who else was there?

A. I don't recall them personally. I don't think I knew them. At the time they were strangers to me.

Q. You operated a newspaper there; did you?

A. Yes.

Q. Did you get advertisements from Mr. Percifield from time to time for the newspaper?

A. Yes.

Q. Now, you were also town clerk of Rangely for a while; were you not? A. Yes.

(Testimony of William Lehman.)

Q. For what period, sir?

A. July, 1950, till April 1, 1955.

Q. Are you familiar with the donations made to the town to the general fund of Rangely by the Ace High Club?

A. I was familiar with the records showing that; yes.

Q. Do you have any knowledge of the purpose of these donations?

Mr. Anderson: Now, we object to this because he was clerk from 1950 to 1955. The record is in evidence, and I submit this is irrelevant and immaterial and not the best evidence.

Mr. Maxwell: Mr. Anderson's interpretation of the testimony is not the same as ours. I understood the witness lived in Rangely from September, 1949, to December, 1949, and must have been familiar with those donations at that time.

Mr. Anderson: All I know is what he [106-A] said.

The Court: I think the witness is entitled to testify whether he knows or not. The objection is overruled for the purpose of permitting the witness whether or not he knows.

A. This was a new incorporated town. There was need of revenue from every possible source that was possible to get it. It would certainly create a favorable public reaction to business.

Mr. Maxwell: I have no further questions.

(Testimony of William Lehman.)

Cross-Examination

By Mr. Anderson:

Q. Now, Mr. Lehman, Mr. Percifield's place of business is about the center of town, I think you testified to that? A. Yes.

Q. I will ask you whether or not you know that other places beside Mr. Percifield made these donations in Rangely over this same period?

A. Yes, sir.

Q. That you know of, how many were there?

A. I am not positive.

Q. Well, about how many?

A. I would say approximately five.

Q. And it was all handled in the same way, as far as you know?

A. To the best of my knowledge.

Redirect Examination

By Mr. Maxwell:

Q. These other five places that made these donations, did they also have gambling on the [107] premises? A. Yes.

Mr. Maxwell: That's all.

Mr. Anderson: That's all.

(Witness excused.)

(Jury admonished and recess taken at 2:30 p.m.)

2:45 P.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

Mr. Maxwell: We have stipulated that the witnesses, Lockett and Fortner, may be excused, your Honor.

The Court: Very well, let the record so show.

ELEANOR JONES

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, please?

A. Eleanor Jones.

Q. Where do you reside, Mrs. Jones?

A. Meeker.

Q. Meeker, Colorado. Where did you reside in 1948 and 1949? A. Rangely.

Q. Are you married, Mrs. Jones? A. Yes.

Q. Do you have an occupation other than housewife? A. I do bookkeeping. [108]

Q. What was your occupation in 1948 and 1949?

A. Bookkeeping.

Q. Was that for some specific firm or individual, or do you have a business?

A. I had my own office. I do it for several different businesses.

Q. Where was that office located?

A. In Rangely.

(Testimony of Eleanor Jones.)

Q. Do you know the defendant here, Raymond Percifield? A. Yes.

Q. Did you do any bookkeeping work for Mr. Percifield? A. Yes.

Q. When was that?

A. I started the latter part of '47 until about the middle part of '49.

Q. Did you do any bookkeeping work after the middle part of '49 for Mr. Percifield?

A. Yes; but not as regularly.

Q. Now, what were your duties in connection with your employment by Mr. Percifield? What type of record did you keep?

A. I would keep the daily records and expenditures and I would summarize and give a monthly total.

Q. Would you keep what we call summary records? A. Yes.

Q. That wouldn't be the basic records for the business, but rather the secondary records? [109]

A. Yes.

Q. Did you have a conversation with Mr. Percifield at the time he employed you?

A. Yes, in regard to records.

Q. In regard to the books that you were going to keep and he was going to keep? A. Yes.

Q. Can you say just about when that conversation was?

A. The latter part of 1947, I think, and I started there about November of 1947.

(Testimony of Eleanor Jones.)

Q. Was there anyone else present at this conversation? A. Not that I remember.

Q. And can you state what was said with regard to the records to be kept, to the best of your recollection?

A. I asked him to keep a record of receipts and then wrote it down receipts from bar, from the cafe, and lounge. It had to be separated because of sales tax returns, excise tax returns.

Q. You prepared the sales tax returns and excise tax returns for Mr. Percifield? A. Yes, sir.

Q. What other conversation did you have at that time with reference to the records?

A. I asked him to report any cash paid out he might have and checks he wrote and make notation of them, what they were for, on the check stub; to what type of expenditure it was for and [110] any other income he had.

Q. Was that specifically with reference to gambling income?

A. If he had gambling income, I stated to keep records.

Q. He gave you records?

A. I don't think he put it down. He didn't want to show it on the monthly summary.

Q. Did you also ask him to keep track of his cash on hand every day?

A. When I first started, I asked him to keep a running cash balance on hand and keep a cash balance.

(Testimony of Eleanor Jones.)

Q. Now, did you thereafter receive that type of information on cash? A. No.

Q. He didn't keep that. What sort of daily records did he keep?

A. He kept the record of all sales, wrote them down.

Q. Did he keep a record of his gambling?

A. I don't know.

Q. You didn't see it? A. No, sir.

Q. Now, you didn't keep for Mr. Percifield a formal set of records; that is general ledger, double entry system, etc.?

Mr. Anderson: We object to that as leading and we submit he shouldn't put the words in the witness' mouth.

The Court: Objection overruled.

Q. Were the set of books which you kept for Mr. Percifield double entry system and general [111] ledgers? A. No, sir.

Q. Could you have kept such a set of records from the information which he furnished you?

A. No.

Mr. Maxwell: I ask this set of photostats be marked for identification.

The Clerk: Plaintiff's Exhibit 30 for identification.

Q. Now, I will show you plaintiff's Exhibit No. 30 for identification and ask you if you can state what that is, please.

A. This is a list of checks written by Mr. Percifield.

(Testimony of Eleanor Jones.)

Q. For what years?

A. Starting the period January, 1948.

Q. How far does that appear to go?

A. This is missing November, 1948. Part of November is here.

Q. November of 1948 is here?

A. To through December, '49.

Q. Now, does that appear to be a photostat, then, of the original record? A. Yes, sir.

Q. Did you keep the original record there?

A. Yes.

Q. Do you see your handwriting on that all the way through? A. Yes.

Q. Do you have the original of that?

A. No, sir. [112]

Q. Do you know where the original is?

A. No, sir.

Q. From what did you make the entries on that document?

A. From the checks, from the check stubs, and I checked them out with the bank.

Q. Are there also deposits on there?

A. Yes, sir.

Q. Where did you make the entry with respect to deposits?

A. Check stubs that had been added on there, or from the bank statements.

Q. Where did you secure the bank statements and the check stubs? A. From Mr. Percifield.

Q. Did you also have the cancelled checks?

(Testimony of Eleanor Jones.)

A. Yes.

Q. Do you have the cancelled checks and bank statements and check stubs now? A. No.

Mr. Maxwell: I offer plaintiff's Exhibit 30 for identification in evidence.

Mr. Puccinelli: No objection.

The Court: The offer will be received in evidence as government's Exhibit No. 30.

Mr. Maxwell: I have another set of photostats which I would like to have marked for identification.

The Clerk: 31 for identification. [113]

Q. Now, Mrs Jones, I show you plaintiff's Exhibit 31 for identification. That is a set of photostats. Can you tell us what it appears to be?

A. Summary of the bar sales, cafe sales, lounge sales, and also miscellaneous cash paid out.

Q. Did you make the original of that record?

A. Yes.

Q. Do you have the original at this time?

A. No.

Q. Do you know where the original is?

A. No.

Q. From what source did you make up that exhibit 31 for identification?

A. From records kept by Mr. Percifield.

Q. What records were those?

A. Recorded daily sales and cash paid out. As near as I remember, there was a daily cash sheet kept in a bound book.

Q. Do you have those daily cash sheets or bound

(Testimony of Eleanor Jones.)

book at this time? A. No.

Q. Do you recognize your handwriting on Exhibit 31 for identification? A. Yes, sir.

Q. For what period is Exhibit 31 for identification? A. From March to October, 1948.

Q. Do you know where the records for the other months of 1948 and for the months of 1949, that is, the cash receipts records [113-A] similar to this are at the present time? A. No, sir.

Q. You don't have them? A. No, sir.

Mr. Maxwell: I will offer plaintiff's Exhibit 31 for identification in evidence.

Mr. Puccinelli: No objection.

The Court: The offer will be received in evidence as government's Exhibit 31.

Q. Now, do Exhibits 30 and 31 represent the records or books which you kept for Mr. Percifield?

A. Yes, sir.

Q. Did you keep any other records for him than those two? A. I may have had a payroll.

Q. Will you look on Exhibit 30 and see if there is a 9th column on there? A. Yes.

Q. Could you have made up your payroll from that? A. Yes.

Q. Now, does Exhibit 30, which is the check record—I believe you stated summary of Mr. Percifield's checks—does that contain all of the information which you received, with respect to Mr. Percifield's bank deposits and checks?

A. I believe so.

(Testimony of Eleanor Jones.)

Q. And exhibit 31, which is the record of cash receipts and [114] pay-outs in summary form, does that contain all the information which you had during the period for which we have it here, with respect to Mr. Percifield's cash receipts and pay-outs? A. Yes.

Q. Now, on Exhibit 30, the check record, what different columns of expenses and other items did you maintain in that record?

A. Payroll; entertainment expense, out of which was expense for orchestra; heat and lights. Cafe purchases and bar purchases. Those are about the only columns I maintained. The others are general ledger columns.

Q. In other words, you threw everything else in the general ledger? A. Yes.

Q. Now, I will show you an entry on page 4 of Exhibit 30. I wonder if you will read the item, which is two lines above the sixth, under the date of March 15, second from the last entry on that date. Read that item all the way across.

A. March 15, 1949, check made out to Bert Taylor, check 238, amount \$400, general ledger column, charged up to personal expenditure, not an expense of the business.

Q. Then taking that check as an example, you would then put down the date, of course, then the payee's name, is that correct? A. Yes.

Q. Then what would come after that?

A. The check number. [115]

(Testimony of Eleanor Jones.)

Q. Then what?

A. Amount and the distribution.

Q. Which would be under amount, the same amount in another column? A. Yes.

Q. And if it was in a general ledger column, there would be some explanation usually, is that right? A. Yes, the type of expense.

Q. Now Exhibit 30, besides record of the checks itself, also shows a record which you put down from the deposits, is that correct, deposits to the bank account?

A. From the bank statement or checks stubs.

Q. And that would be the First State Bank of Rangely? A. Yes.

Q. The deposits there then are taken from the ledger sheets or the check stubs, is that correct?

A. Bank ledger sheets or the check stubs.

Q. Did you reconcile the bank accounts monthly as part of your duties?

A. I did, yes; I listed the checks monthly and then compared with the check stubs.

Q. To make sure the bank did not credit too much or too little to Mr. Percifield?

A. Yes.

Q. Did you ever try to reconcile the deposits with the cash [116] receipts which were given you on Exhibit 31? A. No, sir.

Q. Did the deposits agree with the cash receipts on Exhibit 31? A. No, sir.

Q. Let us take the first month here, if we can

(Testimony of Eleanor Jones.)

see what the difference is. The first month, page 1, cash receipts record is what?

Mr. Anderson: I do not understand the question.

A. Well, I have to add three figures together to get the total.

Q. Would you like a piece of paper and pencil?

A. I get 5,578.87.

Q. Would you turn to the place in Exhibit 30 where the bank deposits for that month are shown. State what the total deposits are for that month.

A. I have them listed as 8,908.22.

Q. We read that check for 1946 Chevrolet Bert Taylor. How do you show that that was a personal charge?

A. It has a "Per" by it.

Q. In other words, "Per" means personal and it shouldn't be a business expense. Now when you were in doubt—if you ever were—as to the classification of a check, whether it was bar expense or what, did you ever ask any one?

A. I would ask Mr. Percifield.

Q. And what would his reply be? [117]

Mr. Anderson: We object on asking about a general course of conduct and asking what his reply would be.

The Court: I don't think counsel is asking for the exact words, are you?

Mr. Maxwell: No, sir.

The Court: I think what he is trying to get at is what was this witness advised by Mr. Percifield.

Mr. Maxwell: Yes.

(Testimony of Eleanor Jones.)

Mr. Anderson: But he has gone much farther and asked what his reply would be.

The Court: Reframe your question, counsel.

Q. Would Mr. Percifield tell you where to place the checks?

A. He would tell me what type of expenditure it would fall.

Q. Now did you prepare the income tax returns for Mr. Percifield for the year 1948?

A. No, sir.

Q. Did you prepare any information for insertion in the 1948 return if you know?

A. I think I probably made a yearly total of all receipts and expenses, as far as bar, cafe and lounge.

Q. Did you have any information as to gambling receipts? A. No, sir.

Q. Did you have any information as to gambling losses? A. No, sir.

Q. Do you reflect that in your summary [118] sheets? A. No, sir.

Q. Now as to the 1949 return, did you have anything to do with the preparation of that?

A. Yes, sir.

Q. I will show you plaintiff's Exhibit 3 in evidence and ask you if you can state what that is?

A. Income tax return filed for the year 1949.

Q. Does your signature appear on it?

A. Yes, sir.

Q. That is Mr. Percifield's return, of course?

A. Yes, sir.

(Testimony of Eleanor Jones.)

Q. When did you prepare that return?

A. My best recollection it was done during the last week before March 15th.

Q. March 15, 1950? A. Right.

Q. Did you prepare that return at Mr. Percifield's request? A. Yes, sir.

Q. What did you use to prepare the return?

A. Summary record file, the checks, cash paid out, also record given to me of his Nevada Club.

Q. His Nevada Club receipts—did you keep the books for the Nevada Club? A. No, sir.

Q. That was the Nevada Club at Wendover? [119] A. Yes, sir.

Q. Did Mr. Percifield give you information from the Nevada Club? A. Yes, sir.

Q. To place on the return?

A. The books of the Nevada Club.

Q. And in preparing the 1949 figures for the 1949 return, what did you do?

A. I don't understand what you mean.

Q. Well, did you add your summary sheets to find the gross receipts? What else did you do in that respect?

A. I got the yearly totals of receipts and expenses and added the totals that were furnished me for the Nevada Club.

Q. Did you take these figures from daily records Mr. Percifield maintained, or from monthly summaries? A. From my monthly summaries.

Q. When you had compiled your figures for the

(Testimony of Eleanor Jones.)

1949 return, did you discuss them with Mr. Percifield?

A. As near as I remember, as I compiled a figure, I discussed it with him or showed him what the figure was.

Q. Did you have a conversation at that time?

A. I always made a practice to ask if there was any other income or any other losses that should go on the tax return.

Q. What was Mr. Percifield's answer to this question?

Mr. Anderson: We object to it—not sufficient foundation. He is just inquiring about general practice and I do not [120] believe that general practice can be based on a particular case.

Mr. Maxwell: I will withdraw that question.

Q. Did you ask this question of Mr. Percifield?

A. To my recollection, I did.

Q. When was that, approximately?

A. When I got the figures compiled or typed up for the government.

Q. That would be a few days before March 15, 1950?

A. Yes, sir.

Q. Was there anyone else present at this conversation?

A. Not that I remember.

Q. What was Mr. Percifield's answer to the question?

A. That he had no other income or losses that should go on his return.

Q. Did Mr. Percifield, to your knowledge, know that you had no record of his gambling income?

(Testimony of Eleanor Jones.)

Mr. Anderson: We will object to that, if the Court please, because it hasn't been established that there is a gambling income, really.

Mr. Maxwell: Well, certainly a gambling establishment——

The Court: He can ask whether or not there was a return on that particular item. If he did not have any gambling income, the answer would be no.

Mr. Anderson: That wasn't his question. His question was, did Mr. Percifield know she did not have a record of his [121] gambling income?

Q. Did Mr. Percifield know that you did not have a record of any gambling income he may have had?

A. Yes, I knew that I didn't have that record.

Q. Did you ever see any records of his gambling income, if he had some? A. No.

Mr. Maxwell: We have nothing further.

Cross-Examination

By Mr. Anderson:

Mr. Anderson: May this be marked?

The Clerk: Defendant's D.

Q. Mrs. Jones, you say you never had any records of any gambling income at the time you kept Mr. Percifield's books?

A. I don't remember any for the year 1949, which is what we were speaking of.

Mr. Maxwell: 1948 and 1949.

(Testimony of Eleanor Jones.)

Q. You don't remember any for the year 1949 or 1948?

A. If I could see all the records, I could say whether there was any income or not, but I don't have all the records. I don't recall a gambling income given me.

Q. Didn't you just tell Mr. Maxwell that you didn't have any records of any gambling income that Mr. Percifield had?

A. I don't remember of having any.

Q. Is this document, except the pencil down here, the ink part of it, in your handwriting? [122]

A. Well, I see where I have been confused. This is for the Nevada Club——

Q. Would you just answer the question, please?

A. This is in my handwriting.

Mr. Maxwell: Let the witness explain. Give her an opportunity to explain her answer.

Mr. Anderson: That is all I asked her. I offer it in evidence.

Mr. Maxwell: May I take the witness on voir dire?

The Court: You may.

Q. (By Mr. Maxwell): Are the ink figures on this document in your handwriting?

A. Yes, sir.

Q. Are the pencil figures in your handwriting?

A. No, sir.

Q. Do you know who made the pencil figures?

A. No, sir.

Q. Is this writing on the back of Defendant's

(Testimony of Eleanor Jones.)

Exhibit D for Identification in your handwriting?

A. Yes, sir.

Q. Did this document have anything to do with the Ace High Club? A. No, sir.

Q. That is for the Nevada Club?

A. Yes, sir.

Mr. Maxwell: I will object to the admission of the document on the ground it has unexplained figures on it, presumably [123] being offered in toto.

Mr. Anderson: We offer only her writing.

The Court: State to the Court the purpose of the offer.

Mr. Anderson: She said she never had any record of any gambling. The document will reflect on that evidence.

The Court: You offer that for the purpose of impeachment, or do you desire to offer it for some other purpose? The objection may be material if it is offered for other purposes.

Mr. Anderson: We will offer her part of it for impeachment of her evidence as to what she said about the records she had been given.

Mr. Maxwell: Then at this time it is not properly admissible, because the witness has not been able to explain.

The Court: That is your job. We will give her a chance to explain. If she is a little bit confused here and does not have presence of mind to explain voluntarily, it is up to you, counsel, to see that the witness at least has an opportunity to explain her answer, if she is impeached.

(Testimony of Eleanor Jones.)

Mr. Anderson: We offer this in evidence.

Mr. Brown: We object on the ground the proper foundation for impeachment has not been laid. She should have an opportunity to examine it and ask her if she wishes to change [124] her statement.

The Court: She has had an opportunity. He has asked her three times already.

Mr. Brown: I do not think she ever had an opportunity to explain.

The Court: I will give counsel for the government an opportunity to question this witness that she might explain any answer she has or if she wishes to.

Mr. Anderson: At this time?

The Court: Yes, at this time.

Q. (By Mr. Maxwell): Would you care to your answers with respect to having no records of gambling income, in connection with this sheet on the Nevada Club?

A. When you first asked the question, I was thinking of the Ace High Club only. There were gambling receipts from the Nevada Club, yes, sir.

Q. And those are shown on the face of the return?

A. Shown on the return.

Mr. Anderson: We offer the document, if the Court please.

The Court: The offer is received in evidence as Defendant's Exhibit D. It might be noted, for the purpose of the record, that this offer was made and received in evidence for the purpose of impeachment [125] and not for the record of any information made.

(Testimony of Eleanor Jones.)

Q. (By Mr. Anderson): Then, Mrs. Jones, you were in error when you stated——

The Court: Now, just a second, counsel. That is what you stated it was offered for and it is and I see no reason to go farther, unless you have additional testimony you wish to elicit by this exhibit.

Mr. Anderson: We do.

The Court: Very well. Go ahead, counsel.

Q. You were in error when you stated Mr. Percifield never gave you any documents showing gambling?

Mr. Brown: That assumes a fact not in evidence. There is not any evidence she was in error. She might be talking about separate things whether income from the Ace High Club receipts or Nevada Club receipts. The witness was obviously confused.

The Court: Well, gentlemen, I don't think we need to go into this. It was a question in a sense whether the witness knew what she was answering to. She explained that and that is clear enough.

Mr. Anderson: We ask that this be marked Defendant's Exhibit E.

Q. Mrs. Jones, I show you what has been marked Defendant's Exhibit E for Identification as Defendant's Exhibit E, and I [126] will ask you if the handwriting part on that exhibit is in your handwriting? A. Yes, sir.

Q. You made that up, did you?

A. Yes, sir.

Q. Did you type it? A. I suppose so.

Q. Do you know whether you did or not?

(Testimony of Eleanor Jones.)

A. It is my writing; I presume I did.

Q. What has been marked Defendant's Exhibit E for Identification and which you say is in your handwriting, does that bear the correct date that you wrote it?

A. No, that is for the month ending November 30, 1947.

Q. Is that for the correct date, for the period it covered for the month ending November 30, 1947?

A. I guess so.

Q. Now, I show you what has been marked as Defendant's Exhibits F and G and ask you to examine them and tell me whether or not you used them in making up Defendant's Exhibit E?

Mr. Maxwell: I do not think it has been established that the witness has ever seen these documents. Perhaps the proper foundation has not been laid for the question asked by counsel.

Mr. Anderson: That is what I am trying to do here now.

Mr. Maxwell: Why don't you ask her? [127]

Q. Did you ever see Defendant's Exhibit F and Defendant's Exhibit G before?

A. I can't remember.

Q. You can't remember whether you did or did not see them before. Don't they bear your check marks? Do you know whether or not you used Defendant's proposed exhibit for identification F and G in compiling Defendant's Exhibit E?

Mr. Maxwell: I object. The witness says she doesn't know whether she did or not.

(Testimony of Eleanor Jones.)

The Court: Let the witness answer.

A. One copy is dated in October, the first of November, and I don't know whether I did or not.

Q. You don't know whether you used them or not?

A. There should be a summary sheet which would compare when those figures were made.

Q. Now, Mrs. Jones, inviting your attention to Plaintiff's Exhibit No. 3, which is an income tax return for 1949 for Raymond Percifield, and bears your signature here, I will ask you if on the back of that statement attached there, if you made that up also as a part of that income tax return?

A. I typed this sheet up.

Q. Calling your attention to the receipts there, I will ask you whether it shows anything about gambling?

A. Yes, sir.

Q. What does it show? [128] A. \$968.50.

Q. Then you made up, that income tax return that shows that amount of gambling?

A. Yes, sir.

Q. And signed it as adviser; the one that made it up?

Mr. Maxwell: Which one of the questions are you asking—did she sign it as adviser or the one that made it up?

Mr. Anderson: I believe I will take the one that made it up. That is your signature as having signed it as the one that made it up? A. Yes.

Q. Mr. Percifield came to you to get you to make this income tax return, did he? A. Yes, sir.

(Testimony of Eleanor Jones.)

Q. And you were competent and capable of making it? A. I thought so.

Q. You made the calculations of the figures that are shown on this income tax return?

Mr. Maxwell: Which one?

Mr. Anderson: The one I just showed her, Exhibit 3.

Mr. Maxwell: 1949?

Mr. Anderson: Yes. Bears her signature.

A. Yes.

Q. You made that yourself? A. Yes.

Q. Mr. Percifield did not have any part in making the computations [129] on the return?

A. No, sir.

Q. Showing you on Schedule 3 the computations on the last part of that schedule, I will ask you if there is any error there? A. Yes, sir.

Q. Mr. Percifield did not do that?

A. No, sir, I did that.

Q. Now, Mrs. Jones, directing your attention to Plaintiff's Exhibit 30, on page 4 thereof, and the check that you have marked there Bert Taylor, 1946 Chevrolet, as 228, has that been marked over or not, the number of that check?

Mr. Maxwell: Possibly the witness can tell from the photostat; that is larger than the original records.

Mr. Anderson: We assume the witness can answer.

A. In my handwriting—it looks like I may have written that over.

(Testimony of Eleanor Jones.)

Q. Do you know what the number was?

A. The check was number—let me see, I may have made an error.

Q. Would you say you did or you did not write over a number there? A. It looks like I did.

Q. Do you know what the other number was before you wrote over it? A. No, sir.

Q. Do you know the Bert Taylor that that check was made out to? [130]

A. Not personally, no.

Q. Do you know whether he is here as a witness or not? A. I understood that he was.

Q. You understood there was a Bert Taylor here. Do you know what initials the Bert Taylor the check for \$400 was made out had, if any? Do you know whether he had any initials beside Bert Taylor? A. State the question again.

Q. Do you know whether he was known as Bert W. Taylor or Bert L. Taylor, or what?

A. No, sir.

Mr. Anderson: We would like to have this paper marked.

The Clerk: Defendant's Exhibit H.

Q. Do you at this time, Mrs. Jones, have any recollection of where you got the information about this \$400 check? Do you remember now?

A. I would have to look up the records. I have no recollection.

Q. You have no independent recollection?

A. No, sir.

Q. I show you what has been marked as Defend-

(Testimony of Eleanor Jones.)

ant's Exhibit H and ask you to examine that and say whether or not that is the check that is entered on the record there? A. Yes, sir.

Q. Is that the check? A. Yes, sir. [131]

Mr. Anderson: We will offer Defendant's Exhibit H in evidence.

Mr. Maxwell: No objection.

The Court: The offer of Defendant's Exhibit H for Identification will be received in evidence as Defendant's Exhibit by that number.

Q. Now, Mrs. Jones, I will ask you to please examine this Defendant's Exhibit H and advise us, if you can find anything on that check that says what it was given for? A. No.

Q. Defendant's Exhibit H, I will ask you to look at that and tell us what name it is made out in?

A. Bert L. Taylor.

Q. Not Bert W. Taylor? A. No.

Q. Mrs. Jones, showing you what is marked Plaintiff's Exhibit 30, I will call your attention to page 14 of that Exhibit 30, and I ask you to look at the check listed there as 246 and tell me if that is in your writing; dated May 5, 1948. Where is page 14 of this record? A. Here.

Q. Now, calling your attention to check No. 246 for a thousand dollars, is the writing there beside that number in your handwriting?

A. No, sir. [132]

Q. Now, on the exhibit that you have before you, Mrs. Jones, is all of the entry that is made there in your handwriting, except the number of the page?

(Testimony of Eleanor Jones.)

The Court: What record is that?

Mr. Anderson: It is Plaintiff's Exhibit 3.

Mr. Maxwell: I believe it is 30.

Mr. Anderson: I beg your pardon.

Mr. Maxwell: Are you referring to our Exhibit 30, on which page?

Mr. Anderson: No. I will try it again.

Q. Does all that appears on the line where check No. 246 is entered on this exhibit in your handwriting?

Mr. Maxwell: If you can tell.

Mr. Anderson: Well, I suggest to the Court please, that counsel has no right to inject things like that in and try to tell how the witness should answer, and I except to that.

The Court: As a matter of fact, you are both experienced. I don't know there is anything the Court can do about it.

Q. Would you answer the question please?

A. The check number and amount and the little check beside it, which shows the check cleared the bank, and the distribution, is in my handwriting. Now the payee is not. I do not know who printed that in there.

Q. I show you what has been marked as Defendant's Exhibit I and [133] ask you to examine that and tell us whether or not that is the check that is represented as 246 on Plaintiff's Exhibit 30?

A. Yes, sir.

Q. That is the check?

(Testimony of Eleanor Jones.)

A. Yes, sir, that is represented as 246.

Mr. Anderson: I offer this check in evidence.

Mr. Maxwell: No objection.

The Court: The offer on the part of the defendant will be received in evidence as Defendant's Exhibit I.

Q. Do you know why you did not fill in the name of the payee on that check?

Mr. Maxwell: Objected to as calling for conclusion of the witness.

The Court: If she knows——

A. I imagine——

The Court: No; don't imagine.

A. Usually the payee would be right down there on the check stub when I listed the check and I probably failed to list it in.

Q. You did check the checks when you got them back from the bank with the record, did you not?

A. Yes, sir.

Q. The check didn't clear through the bank without any payee on it, did it? A. No, sir.

Q. Now, I call your attention to Plaintiff's Exhibit 31, where [134] it purports to make certain distribution of monies. I will ask you why, if you know, they were not totalled up for tax purposes, the figures you have on these different distributions?

A. I am sorry, I don't understand the question.

Q. You do not know why you did not add those up for tax purposes?

A. They are not added here. I do not know

(Testimony of Eleanor Jones.)

whether they were added on his tax return or not. They are not added here.

Q. That is your bookkeeping, is it?

A. Yes.

Mr. Anderson: Your Honor please, we have some more documents that this witness made up and we would like to ask her about them. They are here in the city, but they are about five blocks from here.

The Court: If you haven't them here——

Mr. Anderson: We haven't finished with her.

Mr. Maxwell: We have some redirect.

The Court: I think the government should go on with its redirect and then have these documents marked.

Mr. Anderson: Very well.

Redirect Examination

By Mr. Maxwell:

Q. I show you what has been marked Defendant's E for Identification, together with Defendant's Exhibits G and F for Identification. What is this Exhibit E again? [135]

A. Sales tax returns.

Q. To the State of Colorado? A. Yes.

Q. For what date is it?

A. For the month of November, 1947.

Q. Do you recall—when would it have been made up in the ordinary course of your duties?

(Testimony of Eleanor Jones.)

A. Some time between the first and 13th or 14th of the following month.

Q. In other words, some time between the first and 13th of December. Do you recall when you made this one up? A. December 18, 1947.

Q. I believe you testified previously that you came to work there the latter part of 1947, November or December, is that correct? A. Yes.

Q. Now, did you prepare that return from your summary records that are here in evidence, at least photostatic copy, or did you prepare it from the daily cash sheets, that type of return?

A. These were prepared from my summary sheets.

Q. And your summary sheets were prepared from the daily sheets? A. Yes.

Q. Now, did you work there in October, 1947?

A. I don't believe so.

Q. I will show you Plaintiff's Exhibit No. 3 in evidence, and ask you to look on the second page there and tell me what the [136] second schedule there is, the second page of that return.

A. It shows receipts for the Nevada Club, cost of sale and the expenses.

Q. Does it show gambling receipts for the Nevada Club? A. Yes, sir.

Q. You didn't keep any record of the gambling receipts from the Nevada Club, did you? You didn't keep any summary sheets or records of any kind of the gambling income of the Nevada Club, either monthly summary or daily sheets, or anything of

(Testimony of Eleanor Jones.)

that sort? A. No, sir.

Q. What did you have then at the end of the year, to the best of your recollection, to prepare that typewritten sheet there showing income from the Nevada Club?

A. I had the totals for the year of the receipts and expenses or else I obtained the totals from the books.

Q. You say you had the books or a summary sheet? Does Exhibit D assist your recollection in that respect?

A. I had the books. I didn't have the totals. I made up the totals myself from the books.

Q. Do you recall what type of books you had for the Nevada Club?

A. I don't recall the exact type of books.

Q. Were they summary sheets, similar to the ones you kept for the Ace High Club?

Mr. Maxwell: Objected to—she says she doesn't recall. [137]

The Court: He just tried to refresh her memory. Objection overruled.

A. These are monthly totals which were typed from the books which had daily sheets.

Mr. Anderson: May the record show referring to "these," you are referring to Exhibit D.

A. Yes, Exhibit D.

Q. And Exhibit D shows monthly totals?

A. Yes, sir, on the receipts.

Q. Does that assist you in determining what

(Testimony of Eleanor Jones.)

type of record you may have had available from the Nevada Club?

A. My best recollection is some sort of a book, some kind of record book.

Q. Were they recorded in summary form or daily? A. I don't know; probably daily.

Q. Now, did you have the Nevada Club books during the years 1948 and 1949, other than to prepare the 1949 return? A. No, sir.

Q. Did you have anything to do with keeping those books? A. No, sir.

Q. There is an error in addition on the return there. Show me where that is, please?

A. On the depreciation schedule. I added \$3,000; it should have been \$3,100.

Q. In other words, he was entitled to about \$100 more depreciation? [138] A. Yes, sir.

Q. Will you look at the income tax return and see if that error made any difference in the amount of tax paid? A. No, sir.

Q. What amount shows on the return?

A. Loss of \$3,921.07.

Q. In other words, your error would add another \$100 to that, is that correct? A. Yes, sir.

Q. So that should have been a loss, should have been \$4,021.07? A. Yes.

Q. Now, I will show you Defendant's Exhibit H in evidence, in the amount of \$400. That is the check to Mr. Taylor? A. Yes.

Q. Did you make the entry in Exhibit 30, referring to the '46 Chevrolet, \$400, from that check?

(Testimony of Eleanor Jones.)

A. From this check?

Q. Yes.

A. No, I probably made it from the check stub.

Q. Now, is there any explanation why the purpose of the expenditure is on the face of the check?

A. No, sir.

Mr. Anderson: We move what she made it from be stricken as wholly immaterial. It is a conclusion of the witness. [139]

Q. In the ordinary course of your business——

Mr. Anderson: We would like a ruling on that, your Honor.

The Court: Overruled.

Q. In the ordinary course of your business, where do you make these entries on the checks from?

A. From the listed checks or the check stubs.

Q. When you did not know the purpose of the expenditure, would you ask Mr. Percifield?

A. I would ask Mr. Percifield.

Q. And he would tell you? A. Yes, sir.

Q. I will show you Defendant's Exhibit I, which is a check from the Ace High Club, Raymond Percifield, to the order of the Nevada Bank of Commerce, one thousand dollars. Did you make the entry in Exhibit 30, your check register, from this check?

A. To my best recollection, it was made from the check stub.

Q. I believe you testified that the name of the payee in that entry is not in your handwriting, is

(Testimony of Eleanor Jones.)

that correct? A. Yes.

Q. Would the payee then have been denominated on the check stub at the time you made the entry?

A. Well——

Mr. Anderson: If the Court please, if she knows.

The Court: That is what he is trying to find out, counsel. [140]

A. No, it wouldn't.

Q. Now, you testified about some written-over figures here, is that the check that was on the '46 Chevrolet to Bert Taylor? I believe you testified that that may have been run over, is that correct?

A. Yes.

Q. If you had your original records, you could tell better whether it had been run over?

A. Yes, sir.

Q. Mrs. Jones, from information which you secured from Mr. Percifield, could you have kept any more complete set of records that you did keep?

Mr. Anderson: We object to that, repetition, your Honor. He went into that once.

The Court: Objection overruled.

A. I could not keep a complete set from the records, no.

Mr. Maxwell: I think that is all of the redirect, your Honor.

Mr. Anderson: We would like to waive any further cross-examination before we ask any more questions.

(Jury admonished and recess taken at 4:30 p.m.) [141]

February 16, 1956—10:00 A.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

The Court: Let the record show that this is the 4th day of the trial of the United States of America vs. Raymond Percifield, No. 12,822. You may proceed, gentlemen.

Mr. Maxwell: I believe Mrs. Jones was on the stand. Counsel desired more cross-examination.

MRS. JONES

having been previously sworn, resumed, testified as follows:

Cross-Examination

By Mr. Anderson:

Q. Mrs. Jones, I show you Defendant's Exhibit I, which is the check made out to the Nevada Bank of Commerce, and I will ask you if I am correct that you testified yesterday that you made that out and posted it from the check stub and not the check?

A. At this time I can't remember. If the entry was on the check stub, I made it from the check stub. If the check stub was not filled out, I would have gotten it from the check.

Q. Do you recall whether you testified yesterday that you did make it out from the check stub?

A. I testified, I believe, that I thought the entry was made from the check stub.

Q. Now, I ask you, if it wasn't made from the

(Testimony of Eleanor Jones.)

check stub, it [142] was made from the check after it was returned from the bank?

Mr. Maxwell: I object; the witness has answered the question twice.

The Court: Objection sustained.

Q. Do you know at what time, with reference to the issuance of the check, you made the entry in the book, whether it was from the cancelled check or the check before it was sent out?

Mr. Maxwell: Objected to as having been asked and answered.

Mr. Anderson: I do not so understand that question.

The Court: I think so. Objection sustained. Let's get moving along, gentlemen.

Q. I show you, Mrs. Jones, what has been marked as Defendant's Exhibit J, which purports to be a check stub of check No. 246, and I will ask you to examine that and compare it with Defendant's Exhibit I and tell us, if you know, whether or not the check came from Defendant's Exhibit J. If the stub is the same as that check?

A. I am sorry; I didn't follow the question.

The Court: I was going to observe that the question did not sound intelligible to me. It was rather complicated.

Mr. Anderson: I will reframe it.

Q. Can you tell us, did this check, which is Defendant's Exhibit I, come from the stub which is marked as Defendant's Exhibit J, [143] which you now have before you?

(Testimony of Eleanor Jones.)

A. May I see the listing of the checks to correspond?

Mr. Maxwell: Exhibit 30.

A. Yes, that is the corresponding check stub.

Q. Then the check stub on Exhibit J is the check, Defendant's Exhibit I?

Mr. Maxwell: Obviously the check stub isn't the check.

Mr. Anderson: I didn't mean it that way.

The Court: What was that again?

Mr. Anderson: I will reframe the question.

Q. Is the check stub, Defendant's Exhibit J, the stub from which Defendant's Exhibit I was torn?

A. It appears to be, but these numbers I put in. They are not prenumbered checks and they could have been torn off by some one other than myself but it does look as if it is the number placed on the stub.

Q. Were the check numbered, do you know, before they were sent out or at the time of the writing?

A. I imagine.

Q. Well, do you remember if they were?

A. They were.

Q. Do you say the checks were numbered in any case after they came back from the bank?

Mr. Maxwell: Objected to as incompetent and irrelevant [144] —did she say.

The Court: Objection sustained.

Mr. Anderson: We will offer in evidence Defendant's Exhibit J.

Mr. Maxwell: May I inquire, is Defendant's Ex-

(Testimony of Eleanor Jones.)

hibit J only the check stub for No. 246, or the entire check stubs?

Mr. Anderson: No, just the one check stub. We will tear it out if necessary. That is all we are offering.

Mr. Maxwell: I wouldn't want it torn out, counsel. We have no objection to it in its present form.

The Court: The offer on the part of the defendant is received in evidence as Defendant's Exhibit J.

Gentlemen, the Court would like to make an observation. We spent a great deal of time yesterday afternoon and didn't proceed very far with the case in chief. You have every right to be as exhaustive as you see fit in your examination of the witnesses, both on direct and cross-examination, and the Court does not want to restrict that, but I will say frankly, it looks as though we were beginning to get out on collateral and irrelevant and immaterial matters and spending a lot of time, my time as well as the jurors'. You may proceed.

Q. Mrs. Jones, I show you what has been marked as Defendant's [145] Exhibit K and ask you to examine that and tell us whether or not that document is in your handwriting?

A. Yes, sir.

Q. You made that up, did you?

A. Yes, sir.

Mr. Anderson: We offer Defendant's Exhibit K in evidence.

Mr. Maxwell: I will object on the ground, first,

(Testimony of Eleanor Jones.)

no proper foundation laid; second, that the proffered exhibit relates to a year other than that in litigation.

The Court: What is this paper or document, to start with?

Mr. Anderson: I may say in explanation, if the Court please, that we have marked the offer in evidence, two exhibits here——

Mr. Brown: Just a moment. If this is in the nature of an offer of proof, it should be made out of the presence of the jury.

Mr. Anderson: It is not an offer of proof.

The Court: What is your purpose, counsel?

Mr. Anderson: The purpose is to show that this witness did see the items on this exhibit, which she denied yesterday.

Mr. Maxwell: The witness did not deny seeing them. She said she did not remember if she saw those exhibits and I object to misstatement of the witness' testimony. [146]

Mr. Anderson: I object to counsel's statement.

The Court: I assume that both the jury and the Court recall just what the witness' answers were at least.

Mr. Maxwell: Your Honor, that document certainly has not been identified and no foundation laid at all.

The Court: Objection sustained.

Mr. Anderson: Well, we will try a little further.

Q. I believe you said, Mrs. Jones, you made the

(Testimony of Eleanor Jones.)

Defendant's Exhibit K, that is in your handwriting?

A. Yes, sir.

Q. What is that document and what is it used for?

Mr. Maxwell: We object to what it is used for. She certainly may say what the document is.

Q. What is the document?

A. A summary of the office, October to December, 1947, distribution of income and expenses for the Ace High Club, Rangely, Colorado.

Mr. Maxwell: I object to any further testimony with respect to that document, in view of the fact it relates to a year other than that in the indictment.

The Court: Mr. Anderson, you said the entire purpose of this is impeachment of the witness.

Mr. Anderson: Yes.

Mr. Maxwell: May it please the Court, I do not believe [147] it is impeaching. She certainly hasn't testified anything contrary to that testimony.

The Court: Objection sustained.

Mr. Anderson: May we make an offer of proof?

The Court: On the basis of impeachment?

Mr. Anderson: Yes, because as we understand——

The Court: (Interceding.)

The Court: I will rule on that.

Mr. Anderson: May we make the offer of proof of these exhibits here. We offer these exhibits in evidence, which are Defendant's Exhibits F and G.

The Court: The Court will not admit them at

(Testimony of Eleanor Jones.)

this time, if you want to tie them on your motion, because that is something else. You spent all yesterday afternoon on the general basis of impeaching this witness and that was done. Now, I don't see where we can add anything in particular by going on another day.

Mr. Anderson: I believe we will ask that the record show exception to the remarks of the Court in the presence of the jury.

The Court: The record may so show. I call to your attention, ladies and gentlemen, at the conclusion of this case you will receive instruction from the Court, to the effect that if, during the course of the trial, there are any remarks or [148] any conduct on the part of the Court that would seem to indicate to you the Court intended to infer anything, either for or against any witness or for or against either of the parties to this action, no such inference was intended and you are to disregard and entirely wipe such thought from your mind. The Judge is required to maintain an orderly procedural method to a case and is required to expedite when necessary.

Mr. Anderson: Before we go further on this branch of cross-examination, we will reoffer Defendant's Exhibits F, G, and K, as bearing on the main issues in the case, in addition to impeachment of the witness.

Mr. Maxwell: I again will object to the proffered exhibits, on the ground no proper foundation has been laid for impeachment and the exhibits are

(Testimony of Eleanor Jones.)

incompetent, irrelevant and immaterial to any of the issues in this case.

Mr. Anderson: We would like to observe that we attempted to lay the foundation; it was objected to and I will add as to the further exhibits that they are which we claim are specified in the last exhibit we offered, which is K.

The Court: The Court does not recall whether you were ruled out in an attempt to lay a foundation or not at this time. Do you recall, counsel?

Mr. Brown: I believe I objected to the method of impeachment, your Honor. [149]

The Court: That is my thought, counsel. That objection did not go to laying the foundation. I do not think the foundation has been laid properly.

Mr. Anderson: I will see if I can lay it.

Q. Referring to Defendant's Exhibit K, proposed exhibit, and Defendant's Exhibits F and G, I will ask you if you can look at these exhibits and tell us whether or not the Exhibits F and G were used in making up Defendant's Exhibit K?

A. From that record I can't tell.

Q. What other record would you use?

A. I would have to have the summary record.

Q. I show you Defendant's Exhibit E and ask you if you are now able to say whether or not any of the information on Defendant's proposed Exhibit K entered into Defendant's Exhibit E, which you said yesterday, I believe, you made up.

Mr. Maxwell: We object as calling for conclusion of the witness; whether any of the information

(Testimony of Eleanor Jones.)

is included or went from one exhibit to another, it seems to me would be apparent on the face of the exhibit. It certainly does not go to lay foundation for impeachment.

The Court: No, the impeachment evidence is ruled out. The witness may answer if she knows. No one would know better than she.

A. As I understand your question, was this used to make up this?

Q. No, were these two used to make up this? [150]

Mr. Maxwell: May the record show what exhibits you are referring to?

Mr. Anderson: Our proposed Exhibits F and G, used in making up our proposed Exhibit K.

A. This was not used primarily. This was made up from the summaries, not from daily records.

Q. Do you know whether or not these two daily records entered into this Exhibit K?

Mr. Maxwell: Objected to as asked and answered.

The Court: That has been asked and answered.

Q. What information would you have to have to determine whether or Defendant's Exhibits F and G were used in making up Exhibit K?

A. I would have to have complete daily records, summary of the daily records, in order to see if they are in these figures.

Q. Did you make a summary of the daily records?

Mr. Maxwell: What period are you referring to?

(Testimony of Eleanor Jones.)

Mr. Anderson: For the period she made this up.

Mr. Maxwell: What period is that?

A. 1947.

Mr. Maxwell: I will object to any further testimony as to 1947. We are involved with 1948 and 1949.

Mr. Anderson: If the Court please, as I remember, the witness testified to a state of facts that was contrary to this. Of course, this goes to impeachment, but it the question of [151] whether or not some of the contentions of the government were actually as they contend for and it goes to impeachment and also the main issues of the case.

Mr. Maxwell: Impeachment has been ruled on.

The Court: The witness has answered all of your questions in relation to it, hasn't she?

Mr. Anderson: I don't know about that.

The Court: If you think she hasn't, ask them again.

Q. I show you, Mrs. Jones, what has been marked as Defendant's Exhibit L, and I will ask you to examine that and tell us whether it is all in your handwriting on the face of it. Not the back. There is another marking. All three sheets.

A. Yes, sir.

Mr. Anderson: We offer this in evidence.

Mr. Maxwell: I object on the ground no foundation has been laid. I don't even know what that piece of paper is.

Mr. Anderson: It shows on its face.

(Testimony of Eleanor Jones.)

The Court: I think the Court is entitled to know it and the jury is entitled to know.

Mr. Anderson: I can go into it further.

The Court: Yes, let the jury know about this.

Q. What part did this record play in making up of the income tax?

Mr. Maxwell: I object to that. Let us find out what this record is first. [152]

The Court: That is what we want to know.

Q. What is that record?

A. The work sheet I prepared of summary of monthly expenses and income from the Ace High Club.

Q. What year?

A. 1948. Some of these totals are not my figures.

Q. Calling your attention to this amount here——

Mr. Maxwell: I object to reading from a document not in evidence.

Mr. Anderson: Well, if the Court please, no one has proposed to read from the document. I merely called her attention to a line.

Q. Calling your attention to this line here on page 3, is that in your handwriting?

The Court: This is at the moment merely marked for identification.

Mr. Maxwell: Yes, your Honor. I object to that as not——

The Court: Objection sustained.

Mr. Anderson: We offer it in evidence, if your Honor please.

(Testimony of Eleanor Jones.)

Mr. Maxwell: May I ask the witness on voir dire?

The Court: You may.

Q. (By Mr. Maxwell): You said some of these figures on these [153] sheets in Defendant's Exhibit L for Identification were not in your handwriting?

A. Yes.

Q. I wonder if you would show me what those are?

Mr. Anderson: We are only interested in the third page, if the Court please, but as the exhibit was all fastened together, we offer it all together, but all we are interested in is the third page.

A. Here.

Q. You are pointing to a total here in ink at the bottom of the first column of figures on page 3, as not in your handwriting? A. Yes, sir.

Q. That is not in your handwriting?

A. No, sir.

Q. And is any part of the total at the bottom of the second column of figures on page 3 in your handwriting? A. No, sir.

Q. And the difference of the two figures and the total below, the line total of the second column of figures, is also in your handwriting?

A. It is a subtraction, not in my hand.

Q. And the total at the bottom of the column of figures in the third column of figures on page 3, that is not in your handwriting? A. No, sir.

Q. Are there any other figures that are not in your handwriting? [154]

(Testimony of Eleanor Jones.)

Mr. Anderson: I think we can save time. We are only offering what is in her handwriting.

Mr. Maxwell: Well, let us find out what is in her handwriting then.

A. I think that is the only ones that appear not in my handwriting.

Q. Can you tell me when this was made up?

A. It was made up January or February of 1949.

Q. And can you tell me what you used to make it up?

A. I used the monthly summaries of the income and expenses.

Q. You are referring to the original records, of which Exhibits 30 and 31 are photostats?

A. That is part of them.

Q. There were some other records that you used in addition to them?

A. Yes, sir.

Q. Which are not in evidence?

A. I do not believe they are.

Mr. Maxwell: We have no objection.

Mr. Anderson: As I said before, I would like to take off the first two sheets.

Mr. Maxwell: Oh, your Honor, the entire exhibit has been offered. I want those first two sheets.

The Court: Very well, the defendant's offer will be received in evidence as Defendant's Exhibit L.

Q. (By Mr. Anderson): Now, calling your attention to the last line on page 3 of this exhibit, will you read the last line there?

(Testimony of Eleanor Jones.)

A. The depreciation building, cost \$50,000; 20 years, \$2,500 a year.

Q. In other words, the depreciation part at that time was figured on a \$2,500 a year basis?

Mr. Maxwell: I object. The witness is not qualified as an expert accountant and cannot testify as to the proper basis for depreciation.

Mr. Anderson: I am not asking her the proper basis.

The Court: If she knows, she may answer.

A. I figured that on a 20-year basis.

Q. Now, Mrs. Jones, I believe you heretofore testified that you signed and made up defendant's income tax return, which is Plaintiff's Exhibit 3?

A. Yes, sir.

Q. You made up the schedules attached, these schedules attached to it? A. Yes, sir.

Q. Now, calling your attention to Schedule 3, on what basis did you figure the depreciation on that schedule on that income tax return, Plaintiff's Exhibit 3?

A. I believe this was on the basis of the return filed in 1947.

Q. That doesn't answer my question. What basis did you figure [156] the depreciation of the Rangely buildings on that schedule?

Mr. Maxwell: I object—the witness has answered in the first place she said on the basis of the return filed in 1947; secondly, he is trying to pick a figure out of the return and the document speaks for itself.

(Testimony of Eleanor Jones.)

Mr. Anderson: May I observe, your Honor, they have been reading from the exhibits. Now, at this point they raise the question.

The Court: You are doing more than reading from the exhibit now, but if the witness understands the question, she may answer.

Q. Do you understand my question?

A. No, sir.

Q. On what basis did you figure depreciation in this income tax return, which you say you made?

A. From the 1947 return.

Q. Will you read from this exhibit on Schedule 2, the lines under Ace High Club, Rangely, Colorado. Will you please read that to the jury?

A. Building, date purchased October, 1947, cost \$50,000, basis of depreciation 40 years, depreciation allowed \$1,550.50. Remaining cost \$41,437.50. Depreciation for 1949, \$1,250.

Q. Thank you. Then, as I understand, Mrs. Jones, on this work sheet you took the depreciation 20 years and on this income tax return it is 40 years?

Mr. Maxwell: Objected to as argumentative, asked and [157] answered.

The Court: It is in evidence. Objection sustained.

Q. In keeping the books for Mr. Percifield, Mrs. Jones, did you know of his paying any interest on any indebtedness during the time that you kept the books?

(Testimony of Eleanor Jones.)

A. I don't remember whether there was any expense of interest or not.

Q. You don't know whether he paid any interest or not?

A. I don't remember any interest expenses.

Q. To refresh your recollection, I show you Defendant's Exhibit L and directing your attention to the last sheet and pen notation at the top of the sheet, I ask you what that notation is?

A. Notation of principal and interest.

Q. A payment on principal and interest?

A. It looks like one payment on principal and interest and I don't know the combination of principal and interest.

Q. On Defendant's Exhibit L, the notation that we just called your attention to, and you say that the notation there, "principal and interest," you don't know whether you put that down as that or it was put on and you were going to check into it.

Mr. Maxwell: The witness' answer is in the record. It is improper.

Mr. Anderson: I am reciting that, if counsel will just bear with me a little while.

The Court: Ask the question.

Mr. Anderson: He interrupted before I could ask it. [158]

Q. Were you using this notation to look up principal and interest when you made the income tax return in 1949 for 1948?

A. I don't follow the question.

(Testimony of Eleanor Jones.)

Q. Do you know when you made this up, this Exhibit L?

A. Some time the first part of 1949.

Q. And you made the income tax return for Mr. Percifield in 1949? A. For the year 1948.

Q. Now, then, did you know when you were going to look this up in 1949 or in January, 1948?

The Court: What?

Mr. Anderson: This principal and interest, the item, the note that is made in her handwriting at the top of the page, and I asked her if it was principal or interest and she didn't know, she made a note to look it up later on.

The Court: Hasn't she answered the entire situation?

Mr. Anderson: I do not believe so.

Mr. Maxwell: In any event, I believe that the question is unintelligible. I certainly don't understand it.

The Court: I have to go along with you, counsel. I don't either.

Q. Do you know, Mrs. Jones, when you put this notation, "Principal and Interest" on this Defendant's Exhibit L?

A. I put the notation down at the time I made the papers up.

Q. Do you know when you made the papers up? [159]

Mr. Maxwell: I object——

The Court: Objection sustained.

Mr. Anderson: That is all.

(Testimony of Eleanor Jones.)

Redirect Examination

By Mr. Maxwell:

Q. Showing you Defendant's Exhibit L in evidence, would this be the summary sheet that you testified on direct examination made up for preparation of the 1948 return? A. Yes.

Q. That is the sheet, in other words, if I understand this correctly, that you made up and gave to Mr. Percifield for his use in having the 1948 return prepared? A. Yes, sir.

Q. Now, would you explain what the figures are on the first page of the sheet? What do they represent generally?

A. Expenses of the Ace High Club.

Q. And the first column represents what expenses? A. Bar purchases for liquor.

Q. And the second represents?

A. Cafe purchases.

Q. And what are the rest of them?

A. Heat and light, wages, entertainment, light, social security tax; there is a column for withholding tax, but not totalled.

Q. Now, on page 2, what are these items represented on page 2, in a general way?

A. More expenses. [160]

Q. Where did the information for expenses on page 1 and page 2 come from?

A. From my monthly summary record.

(Testimony of Eleanor Jones.)

Q. Were there other records that you had available?

A. There are records posted from summary records.

Q. Did you have your check summary records available? A. Yes, sir.

Q. And did you have your cash receipts and expense records available? A. Yes, sir.

Q. In summary form. That is Exhibit 31, I believe. May we have Exhibit 31? You had the original of this photostat, Exhibit 31, available, did you not?

Mr. Anderson: Counsel is leading. This is their witness.

Mr. Maxwell: It calls for a yes or no answer.

The Court: That may be leading. This testimony is rather involved. Now, the witness has before her many documents and sets of figures and it is a confusing job at the best. I think if the question can be identified by directing her attention to it, it should be permitted.

Mr. Maxwell: May I rephrase the question?

Q. Did you have this Exhibit 31 available, or the original of it, in making these up?

Mr. Anderson: Making these up? [161]

Q. Making Exhibit L up? A. Yes, sir.

Q. Now, on page 2 of Exhibit L, will you read the general nature of expenses set out on that page?

A. All of them?

Q. Yes.

A. Insurance; building repairs; telephone; ad-

(Testimony of Eleanor Jones.)

vertising; furniture and fixture column; water; donations; travel; freight; oil; miscellaneous; police protection.

Q. That last one was police protection?

A. Yes, sir.

Mr. Maxwell: I think that will be all.

Recross-Examination

By Mr. Anderson:

Q. The item read for police protection, do you know whether or not that was a night watchman hired? Do you know what made up police protection?

A. If I remember right, it was given to the town marshal.

Q. What for, do you know?

A. Protection around the club.

Q. Now, you have read the columns to the jury on pages 1 and 2 of defendant's Exhibit L; I will ask you to read the columns on page 3 of the same exhibit.

A. Column here for returned checks, deposits. Column for petit cash. Column headed William H. Bacon checks. A net income column of box receipts, bar sales, lounge sales, cafe sales. [161-A] Below that is depreciation notation I made on the building I read before. Furniture and fixtures.

Q. What column is marked income column?

A. The income columns are music box receipts, bar sales, lounge sales, cafe sales.

Mr. Anderson: That is all.

(Testimony of Eleanor Jones.)

Redirect Examination

By Mr. Maxwell:

Q. Referring to the income columns on page 3 on Exhibit L, is there a column there for gambling income? A. No, sir.

Mr. Maxwell: That is all.

Mr. Anderson: That's all.

The Court: Do you wish to retain this witness?

Mr. Maxwell: Yes, your Honor; the government would like to have the witness remain.

The Court: I want to say this—this witness is the person who kept the books of the defendant. In spite of any ruling or observation the Court may have made in connection with the proceedings this morning, the Court does not wish to cut off the defendant from any of his rights of cross-examination; and I want it clearly understood that if counsel for the defendant has any questions or further investigation they wish to make at this time through cross-examination, it will be permitted [162] to the full extent they are entitled.

Mr. Anderson: In view of the Court's statement, we reoffer Exhibits K, F, G and E.

Mr. Brown: We would interpose the same objections.

The Court: Objections overruled. The exhibits will be admitted on the part of the defendant in the order numbered.

(Jury admonished and 15-minute recess taken at 11:00.)

11:15 A.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated

(Mrs. Jones excused temporarily.)

BERT TAYLOR

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your full name?

A. Bert Taylor.

Q. You have been sworn heretofore?

A. Yes.

Q. Where do you reside, Mr. Taylor?

A. Riverton, Wyoming.

Q. Where did you reside in 1948?

A. Rangely, Colorado.

Q. Do you know the defendant?

A. Yes; I do. That is, in '48. I left there in '48.

Q. Where did you go in '48? [163]

A. Riverton, Wyoming.

Q. Do you know the defendant, Raymond Percifield?
A. Yes, I do.

Q. Point him out, can you?

A. Yes. (Indicates.)

Q. Have you ever been in the Ace High Club?

A. Yes.

Q. Have you observed gambling on the premises?
A. Yes.

(Testimony of Bert Taylor.)

Q. What type of games were played generally on the premises?

A. I think blackjack and dice.

Q. Did you observe who was running the games?

A. Not necessarily, no.

Q. Did you observe or do you know, sir?

A. Well, I have been in there at various times and there would be someone running the games, that is all I can say.

Q. Who was running the games?

A. Well, I can't remember the names.

Q. You can't remember the names?

A. No.

Q. Was Mr. Percifield running the games?

A. Oh, I believe I have seen Mr. Percifield working behind the table.

Q. Dealing and banking blackjack——

Mr. Anderson: We object to this leading, if the Court [164] please.

The Court: It is leading. Objection will be sustained.

Q. Now, Mr. Taylor, did you ever have any financial transactions with Mr. Percifield?

A. Yes.

Q. And can you tell me what those were?

A. Well, I sold him a car.

Q. When did you sell him a car?

A. Well, in '48, I believe in the spring of '48.

Q. And what kind of an automobile was it?

A. It was either a '36 or '37 Chevrolet.

(Testimony of Bert Taylor.)

Q. And was the car for the use of Mr. Percifield?

Mr. Anderson: We object to that as calling for conclusion of the witness, and leading and suggestive.

The Court: Well, the question was asked if he knew and to that extent the objection is overruled and he may answer if he knows.

A. Mr. Percifield bought the car for his younger brother.

Mr. Puccinelli: If your Honor please, I think the question calls for a yes or no answer.

Mr. Maxwell: The Court ruled he might answer the question if he knew.

Mr. Puccinelli: I am not going behind the Court's ruling, but I think the question can be answered yes or no. [165]

The Court: Yes, the preliminary question will be answered yes or no.

Q. Then the answer is now no?

A. Well, what is the question?

Q. Do you know for whom the car was intended?

A. Yes.

Q. For whom was it intended?

A. Well, his younger brother; I forget his first name. It was for his younger brother.

Q. And did Mr. Percifield pay you for the car?

A. Well, no. There was nothing involved in it because I owed Mr. Percifield some money at the time and he took the car for the money.

(Testimony of Bert Taylor.)

Q. How much did you owe Mr. Percifield at the time?

A. I don't remember the exact amount, but I think it was around \$200 or \$150.

Q. And when had you become indebted to Mr. Percifield?

A. Oh, I couldn't say exactly. I imagine about——

Q. Was it immediately before he bought the car?

A. No, I would say two or three months before that.

Q. Would you say after the first of January?

A. I can't say. It was in that winter.

Q. Did you have any other financial transactions with Mr. Percifield? A. Nothing. [166]

Q. What was the basis of your indebtedness to Mr. Percifield?

Mr. Anderson: We object to that as immaterial.

The Court: Objection sustained.

Mr. Maxwell: Your Honor, I would like to know what he owed Mr. Percifield money for, wages, or exactly what. I think that is material, what he owed Mr. Percifield money for, whether he had employed Mr. Percifield, or exactly the basis of the debt.

Mr. Anderson: It is immaterial.

The Court: I think it is immaterial. Objection sustained.

Q. Showing you Exhibit 46, a check from the Ace High Club to Bert L. Taylor, will you tell me whether you are the payee on that check, sir?

(Testimony of Bert Taylor.)

A. Well, that isn't my signature, but I believe that is my wife's signature.

Q. You believe that is your wife's signature?

A. I believe it is.

Q. Is your name Bert L. Taylor?

A. Yes, sir.

Q. Do you recall the purpose for which you got this check?

Mr. Anderson: We object; assuming a state of facts not in evidence. It isn't shown he ever got the check.

The Court: My thought that is in effect the question. Ask the question. [167]

Q. Did you ever receive that check, Mr. Taylor?

A. If that is my wife's signature, I received the check. That is all I can say.

Q. Did you receive a check from Mr. Percifield in the amount of \$400?

A. I don't remember.

Q. Did you do anything for Mr. Percifield, whereby you should receive some money from him?

A. Well, I gambled in there.

Q. You think this may be a gambling amount of money, particularly paid to you for gambling?

Mr. Anderson: We object to that as leading and suggestive and calls for what he thinks.

Mr. Maxwell: Your Honor, this is an adverse witness.

Mr. Anderson: But counsel, he isn't going to have any more connection with Mr. Percifield than thousands of other people.

(Testimony of Bert Taylor.)

Mr. Maxwell: I claim surprise. I am entitled to cross-examine.

The Court: The Court is of the opinion no surprise has been shown and if this is a reluctant witness, the Court will correct it and you may proceed with the method of examination.

Q. Sir, is it possible that this is payment to you for monies for gambling debt?

Mr. Anderson: Objected to as irrelevant and immaterial; [168] calling for conclusion of the witness.

The Court: Objection overruled.

Q. What was the question?

Q. Is it possible that you received this check in payment of a gambling debt from Mr. Percifield?

A. It could be possible.

Q. Gambling transactions, plus car transactions, are the only financial transactions you had with Mr. Percifield?

Mr. Anderson: Objected to as leading and suggestive.

The Court: Objection overruled.

A. What was the question?

Q. Are gambling transactions, together with the car transactions you have heretofore testified to, the only financial transactions you have had with Mr. Percifield? A. Those are the only ones.

Q. Did you receive this check in payment for an automobile?

A. Well, that could be possible. I don't remember the amount of this automobile transaction.

Mr. Maxwell: That is all.

(Testimony of Bert Taylor.)

Cross-Examination

By Mr. Anderson:

Q. When did you say you left Rangely, Mr. Taylor?

A. '49. Left there in November, '48.

Q. 1948? A. Yes, sir. [169]

Q. And where did you go to?

A. Riverton, Wyoming.

Q. And were you back to Rangely during the year 1949? A. No, sir.

Q. Or in the year 1948 after you left?

A. No, sir.

Q. Why did you move from Rangely to Riverton?

Mr. Maxwell: Objected to as immaterial.

The Court: Well, yes——

Q. Mr. Percifield, you say this could have been for a car? A. It could.

Q. Did you sell Mr. Percifield a 1946 Chevrolet automobile? A. Not a 1946, a '36.

Q. Now, Mr. Taylor, I will ask you if you know whether or not there were any Bert Taylors in Rangely at the same time you were there?

A. I know there was one other Bert Taylor.

Q. Do you know if there was more than one, beside yourself? A. I don't know at all.

Q. Was he Bert L. Taylor, too?

A. I don't think so. I think his was Bert H. Taylor.

(Testimony of Bert Taylor.)

Q. Was he a carpenter? A. Yes.

Q. Do you know whether or not he did some work for Mr. Percifield? [170]

Mr. Maxwell: Objected to as hearsay.

The Court: You may answer.

Q. Do you know whether or not he did some carpenter work for Mr. Percifield?

A. I don't know.

Q. Do you remember, Mr. Taylor, of ever having in your possession defendant's Exhibit H, this check? A. I don't remember.

Q. Do you remember of ever having seen this defendant's Exhibit H before today?

A. No, sir.

Mr. Anderson: That's all.

The Court: May I have the check, please? Mr. Taylor, I hand you defendant's Exhibit H, the check dated March 15, 1948, made out to Bert L. Taylor, in amount of \$400, signed Raymond Percifield. Will you take that check? Are you presently married?

A. Yes, sir.

The Court: How long have you been married to your present wife?

A. Twenty years, sir.

The Court: I believe you said, in answer to a question, that you hadn't signed that check or endorsed it; it is not your signature, but it might have been the signature of your wife. Is that right? [171]

A. It might have been my wife's signature.

(Testimony of Bert Taylor.)

The Court: During these twenty years, you have observed your wife's signature many, many times?

A. Yes.

The Court: To the best of your knowledge, is that your wife's signature?

A. I believe it is.

Mr. Maxwell: I have no further questions.

(Witness excused.)

Mr. Maxwell: May it please the Court, a conference between counsel for the plaintiff and defendant last night resulted in agreement, which if agreeable to the Court, that the defendant might put on two witnesses out of order at this particular point in the proceeding.

Mr. Puccinelli: That is true, your Honor, we have two witnesses we would like to put on now.

The Court: Very well, you may proceed.

JOYCE PROCTOR

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. Will you state your name to the Court and jury, please? A. Joyce Proctor.

Q. Where do you live, Mrs. Proctor?

A. Meeker, Colorado.

Q. Do you hold any official position in Meeker, Colorado? [172]

(Testimony of Joyce Proctor.)

A. County superintendent of schools.

Q. How long have you been county superintendent of schools? A. Since 1950.

Q. Prior to assuming that position, were you on the school system in Rangely?

A. I was principal of Rangely public schools from 1946 to 1950.

Q. Are you acquainted with the defendant, Raymond Percifield? A. Yes, sir.

Q. How long have you known him, about?

A. Either late of 1947 or early of 1948.

Q. Are you acquainted with his general reputation in the community where he lives?

A. Yes, sir.

Q. About how long have you been so acquainted?

A. Since he came there. His children enrolled in the school.

Q. How many were there? A. Three.

Q. In the school of which you were principal?

A. At the time they enrolled, there were only two. The little girl enrolled in the first grade the following year.

Q. Is Mr. Percifield's reputation in the community he lives good or bad?

A. Well, speaking from the standpoint [173] of—

Mr. Maxwell: We object to the answer of the witness. The answer should be confined to good or bad, I believe.

The Court: Yes.

A. It is good.

(Testimony of Joyce Proctor.)

Q. Now, Mrs. Proctor, you say you went to Rangely when? A. February, 1945.

Q. What kind of community was Rangely?

A. At that time?

Q. Yes.

A. There was no community at that time; one or two buildings, beginning of the oil boom.

Mr. Maxwell: May I ask a question? I believe this witness has testified as to character. Is this witness also to testify to some fact in the case having a direct bearing on the offense?

The Court: Just let counsel bring that out if he wishes.

Mr. Anderson: That is what I intended to prove, the community there generally.

Q. You say it was the beginning of an oil town?

A. It was the beginning of the Rangely oil boom.

Q. How long did the boom continue?

A. The boom, as such, continued, I would say, late '47 or early '48.

Mr. Maxwell: I will object to this as calling for conclusion of the witness, as circumstances of an intangible thing; a boom, unless it can be shown that she is an expert on booms, I would ask that the answer be stricken. [174]

The Court: Well, I think there is some merit to what you say, counsel. We will let the answer stand.

Mr. Anderson: Cross-examine.

(Testimony of Joyce Proctor.)

Cross-Examination

By Mr. Brown:

Q. Mrs. Proctor, you say you have lived in Rangely for how many years?

A. I came to Rangely in February, 1945. I moved to Meeker in 1950.

Q. Have you ever heard of the Ace High Club?

A. Yes, sir.

Q. Have you ever heard of Mr. Percifield's activities in connection with the Ace High Club?

Mr. Anderson: We object to this line of examination, if the Court please, because it is not within the scope of the direct examination. Secondly, it seeks to prove reputation or character with respect to particular conduct or particular trait.

Mr. Brown: I feel, your Honor, that line of questioning goes to his general reputation. She has testified as to conditions in the town. I wish to inquire if she was aware of the gambling conditions and the connection of the defendant with that and the legality of that particular activity in Colorado, of which she is undoubtedly aware.

Mr. Anderson: If the Court please, if they want to [174-A] use this witness as an expert on the law of Colorado, I think they should call her as their own witness. Secondly, we submit cannot cover a particular trait or act, and I think the authorities are rather clear on that, in this sort of an examination.

Mr. Brown: I think your Honor can take judi-

(Testimony of Joyce Proctor.)

cial note that gambling is illegal in every State in the Union except Nevada.

The Court: Objection overruled.

(Question read.)

Q. You may answer.

A. I would say that I have been in the Ace High Club.

Q. Were you there in 1948 and 1949?

A. I have been in off and on from the time he opened.

Q. You observed gambling conducted at that time? A. I never seen gambling.

Q. How often did you go in the Ace High Club?

A. That I can't say. Probably on week ends, maybe after school we would drop in for a few minutes for coffee. Many evenings I went there a little while to dance. I can't tell you how often.

Q. But you did go in the Ace High Club in 1948 and 1949 quite often, is that correct?

A. I am sure I have been in there very [175] often.

Q. After school?

A. Oh, I have been in the Ace High Club on week ends or after school.

Q. You have never seen gambling there?

A. I have never seen gambling.

Mr. Brown: That is all.

Mr. Anderson: That is all.

(Witness excused.)

MORRIS LANGE

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Puccinelli:

Q. Will you state your name, please?

A. Morris Lange.

Q. Where do you live?

A. At Rangely, Colorado.

Q. How long have you lived there?

A. Ten years.

Q. What is your business?

A. Building contractor.

Q. How long have you been a building contractor?

A. I have been actually a building contractor for four years and I have been working at that trade for twenty years.

Q. Prior to the time you were a building contractor, you were working in that trade? [176]

A. Yes.

Q. Would you explain further in what capacity?

A. As construction foreman and construction superintendent.

Q. In other words, I take it from your testimony, you have been in the construction business in one form or another for the last twenty years?

A. Yes.

Q. Mr. Lange, have you seen the Ace High Club in Rangely, Colorado?

A. Yes.

(Testimony of Morris Lange.)

Q. Have you examined the buildings as to construction?

A. Well, I noticed parts of it being constructed.

Q. You have noticed parts of it being constructed? A. Yes.

Q. Have you noticed the construction of the remainder other than that you saw under construction? A. Yes.

Q. Would you describe what that construction is?

A. Well, the original construction was a frame building and it is now stucco on the exterior.

Q. Would you explain the rudimentary construction, with reference to foundation, on the original or the older property?

A. I would call the foundation more or less temporary foundation.

Q. Then from your experience, Mr. Lange, twenty years connected [177] with the construction business, what would you say the life of that building would be?

Mr. Maxwell: At what particular time? The present time?

Q. When did you examine it last?

A. It has been—I couldn't tell you exactly. Of course, living in Rangely, I go by the building almost every day.

Q. You say you noticed parts of the building under construction? A. Yes.

Q. And when was that?

(Testimony of Morris Lange.)

A. That was, I believe, around 1947.

Q. Now as to that time, what would you say the life of the building would be?

Mr. Maxwell: I object to that. There is no foundation laid for opinion testimony at this time. We haven't determined the extent of the inspection as yet. We don't know what he did, whether he viewed it from afar, whether somebody else built it, or whether he was actually concerned in the building of the building itself. We don't have the facts on which he would base his conclusion.

Mr. Puccinelli: I think, your Honor, please, he saw it, he testified the foundation was of a temporary nature, and he has testified he has worked——

The Court: You may answer.

Q. Do you recall the question, Mr. Lange? [178]

A. Repeat it, please.

(Question read.)

A. I would say approximately twenty years.

Mr. Puccinelli: That's all.

Cross-Examination

By Mr. Maxwell:

Q. Mr. Lange, you say you observed the Ace High Club in 1947 and 1948?

A. Being constructed, part of it.

Q. You are sure it wasn't in the early part of 1947?

A. It could have been 1946.

Q. It could have been 1945?

A. No, sir.

Q. How about 1944? A. No, sir.

Q. How late could it have been? Could it have been 1949? A. It could have been.

Q. 1948? A. It could have been '48.

Q. Now where did you make your observation from, what point?

A. The time I noticed the construction, I was constructing a building on the opposite side of the street.

Q. You were constructing a building on the opposite side of the street? A. Yes, sir.

Q. The Ace High Club is on the main street in Rangely? [179] A. Yes, sir.

Q. How wide is the street at that point?

A. Approximately 50 feet.

Q. And where were you stopping when you made your inspection? A. Across the street.

Q. You then weren't in a position to see the foundation of the Ace High Club? A. Yes.

Q. You were in a position to see the foundation?

A. Yes.

Q. What do you mean by foundation, Mr. Lange?

A. Foundation of the building is the part of the building that is designed to support the building upon the foundation itself.

Q. The foundation is usually the part of the building that is in the ground, so to speak, isn't that right? A. Yes, sir.

Q. Now when did you go to Rangely?

A. In 1946.

Q. Did you see the building, the original build-

(Testimony of Morris Lange.)

ing, constructed? A. No, sir.

Q. What type of building was the original building?
A. Frame building.

Q. Were additions made to the frame building?

A. Yes. [180]

Q. And when were those additions made?

A. In 1946-'47.

Q. And those are the additions which you watched building?
A. Yes.

Q. You watched the foundation to the additions going up, but you didn't see the original foundation being put in?
A. No, sir.

Q. What was the construction of the additions?

A. Cinder block.

Q. That is pretty good stuff, isn't it?

A. I don't class it as very good building material.

Q. Well, it is better than frame? A. Yes.

Q. As a rule, cinder blocks have a habit of lasting more than twenty years?

Mr. Puccinelli: Objected to as argumentative.

The Court: Objection sustained.

Q. Now how many additions were put on in cinder blocks to Ace High Club?

A. I only noticed one.

Q. Do you know what the size of that addition was?
A. Approximately 20 by 40.

Q. That is the only addition that was made to the original frame building?

A. That I observed. [181]

Q. Are there other additions to the frame build-

(Testimony of Morris Lange.)

ing? A. Yes, I believe there are.

Q. And what is the construction material of those? A. They are frame.

Q. And when were they built, if you know?

A. I don't know.

Q. Did you examine those after they were built?

A. No, sir.

Q. When you said the building had a 20-year life, you were talking about the frame building, the original building? A. The whole building.

Q. Which building are you talking about, the original building, the cinder block addition, the other frame additions, or all of them?

A. All of them.

Q. But you only had occasion to watch the cinder block addition go up? A. Yes, sir.

Mr. Maxwell: That's all.

Redirect Examination

By Mr. Puccinelli:

Q. Mr. Lange, you say you observed part of the construction going up? A. Yes, sir.

Q. Do you know who owned the Ace High Club at the time the construction was going on? [182]

A. Mr. Rosa.

Q. That is Joe Rosa? A. Yes.

Mr. Puccinelli: That is all I have.

Mr. Maxwell: That's all.

(Witness excused.)

(Jury admonished and recess taken at 12:05 until 1:30 p.m.)

February 16, 1956—1:30 P.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

JAMES W. BELL

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxewll:

Q. State your name, please.

A. James W. Bell.

Q. Where do you reside?

A. Denver, Colorado.

Q. What is your occupation?

A. I am Special Agent of the Intelligence Unit of the Internal Revenue Service.

Q. Stationed at Denver, Colorado?

A. Yes, I am.

Q. How long have you been a member of the Intelligence Unit? [183]

A. I have been Special Agent since April of 1951.

Q. And were you with the Internal Revenue Service prior to that time?

A. I began employment September 1, 1940.

Q. And what were you employed as?

A. As deputy clerk.

Q. You continued that until you became Special Agent in 1950? A. That is right.

(Testimony of James W. Bell.)

Q. Did you make an investigation as to the tax liabilities of the defendant, Raymond Percifield?

A. Yes, I did.

Q. When did you make that investigation?

A. The investigation was referred to the Intelligence Division on September 22, 1952.

Q. And did you receive the assignment to investigate? A. Yes.

Q. What did you do in making your investigation in September of 1952?

A. Well, on September 30, 1952, Revenue Agent M. E. Thomas and I made a trip to Rangely, Colorado; talked to Mr. Percifield.

Q. Was Mr. Thomas an employee of the Revenue Service?

A. Mr. Thomas was the Revenue Agent who was assigned to participate in the investigation.

Q. You say you went to Rangely, Colorado, on September 30th? [184] A. That is correct.

Q. And what did you do at Rangely?

A. We met Mr. Percifield at his place of business, the Ace High Club.

Q. Who else was there?

A. Mr. Thomas, Mr. Percifield and I.

Q. And the date again, September 30th?

A. That's right.

Q. Was it morning or afternoon?

A. Ten o'clock in the morning.

Q. Will you tell me what was said at that time?

A. Well, I introduced myself and showed Mr. Percifield my credentials. After he looked at them,

(Testimony of James W. Bell.)

I said we would like to talk to him, so he took us back to a booth in the Ace High Club and that is where we had the conversation.

Q. What was said by him in the booth there?

A. I mentioned to Mr. Percifield that we had his 1948, 1949 and 1950 federal income tax returns for investigation and we wanted to ask him some questions about them. I asked Mr. Percifield if he had any objection to answering questions under oath. He said he did not, so he raised his right hand and I asked him, "Will you solemnly swear the answers you are about to give will be the truth, the whole truth and nothing but the truth, so help you God," and he said yes. I asked him questions first about his personal history, his name, his age, place of [185-186] birth, his marital status, his wife's name, his dependents. Mr. Percifield said he was born in Chariton, Iowa, in 1911; that he was married to Mossie Percifield; that he had three daughters between the ages of 9 and 17. At this point I informed Mr. Percifield that he had the right, under the Constitution, to refuse to answer any questions, to refuse to supply any information and any information he gave us or any records that he produced might be used against him in any proceeding, criminal or otherwise, which might hereafter be undertaken by the United States. I also informed Mr. Percifield that he had the right to have an attorney present. I asked him if he fully understood and he said he did. I then went into sources of income. I asked him what sources of

(Testimony of James W. Bell.)

income he had in 1948, 1949 and 1950. He said he purchased the Ace High Club in October, 1947, and that he had owned the Nevada Club, but he did not own it at that time of the interview. I asked him if he had any other sources of income and he said no. I asked him about any non-taxable receipts. I asked him if he had received any gifts, any inheritance, any trust fund. I asked him if he had ever been a beneficiary under a life insurance policy, and he answered no to all those questions. I asked him about cash on hand at the end of 1947. Mr. Percifield said that when he first bought an interest in the Nevada Club, he bought a partnership interest; that they always tried to maintain a five-thousand-dollar bank roll, and that each partner put up half. As far as the Ace High [187] Club is concerned, Mr. Percifield said he only kept money enough for current expenses. He said there was a safe in the Ace High Club that was never used. He said he did not have a safe deposit box and no members of his family had one or were holding any cash for him. I asked him about certain checks, whether he ever owned any stocks or bonds, and he answered that he did purchase or owned any of those items, during that period. I asked him about household furniture. As near as he could remember, the household furniture had a cost value, at the end of 1947, of about \$500; that there had been on change during the period. I asked him about jewelry and furs. The best he could remember on that was about \$150 at the end of 1947; that

(Testimony of James W. Bell.)

there was no change during 1948 and 1949. I asked him about automobiles. Mr. Percifield said that he bought a 1946 Buick in 1946 and that the cost value at the end of 1947 was about \$2400. He said that he held this Buick until some time in 1949, when he traded it for a new Buick purchased in 1949, and he thought the cost value of the new Buick at the end of 1949 was about \$3350. I had the 1948, 1949 and 1950 returns. I presented them separately to Mr. Percifield and asked him to look at them and examine the schedules attached to those returns and tell us whether or not they were his. After he studied them a little while, he said they were his and he said the signatures on those returns were his. I then asked him with respect to the depreciation schedule on the 1948, 1949 and 1950 returns. I asked [188] him about the Nevada Club, what he paid for the business, and asked him about the Ace High Club, what he paid for that business. I asked him a few questions about equipment that he had shown on his depreciation schedule and I asked him about inventory and I think the inventory was shown at \$1275 at the end of 1948, and I asked him if it remained about the same during the period and he said it would remain about the same, at both the Nevada Club and the Ace High Club, during 1948, 1949 and 1950—well, not with respect to the Nevada Club; the Nevada Club, I believe, ceased to do business sometime in May of 1950. I asked Mr. Percifield about gambling, with specific reference to 1948, 1949 and 1950, and his reply was that he

(Testimony of James W. Bell.)

had perhaps a thousand dollars in gambling gain during that period.

The Court: May I ask the witness about that point? You asked him about gambling and he said he had about one thousand dollars in gambling games?

Mr. Maxwell: Gains.

The Court: Was that 1948, 1949 and 1950, that total?

A. That is the way the question was asked and that is the way he answered it. I asked him if he kept any record of his gambling income and he said no. I asked him about his living expenses, what he thought it would cost him to support his wife and three children, and after some discussion he thought it would be about three thousand dollars a year, that is, 1948, 1949 and 1950. [189]

Q. Did he say how he paid his living expenses?

A. Yes, he said most of his living expenses were paid in the form of cash. I asked him about his participation in gambling games and he said he had taken part in twenty-one, dice and poker games. I asked him what records he had maintained for the Ace High Club. He said that he kept his cancelled checks and bank statements and he had always prepared a daily report, either he or Mrs. Percifield had prepared a daily report, which would show the receipts and pay-outs for that particular day. I asked him if his records were available and he said that they were, and I asked him if he would let the agents have them for examination and he said that

(Testimony of James W. Bell.)

he would. I asked him if he had ever made any arrangements for payments to local welfare agencies in return for permission to operate gambling games or similar concessions. He said no.

Q. Did you ask him who prepared his returns?

A. Yes, I asked Mr. Percifield who had prepared his returns. He said Mr. William H. Bacon, Salt Lake City, had prepared his 1948 return, and Mrs. Eleanor Jones had prepared his 1949 return and Mr. Floyd at Truant had prepared his 1950 return.

Q. Did you ask him what he used in preparation for the return?

A. Yes, I asked him what the returns had been prepared from and he said the records that he had furnished to his bookkeeper, Mrs. Jones, and the records that she had kept for him. I asked him if he was aware of the fact the law requires all taxpayers to [190] keep adequate records of income and expenses, and he said he was.

Q. Did you ask him about bribes paid police officials?

A. I asked him if he had ever paid bribes to law enforcement officers and he said no.

Q. Now about the Nevada Club, I believe you said you asked him about his cash on hand and he said he had a partnership interest in the Nevada Club.

A. Yes, to begin with he said he had a partnership interest, but he later purchased his partner's interest.

(Testimony of James W. Bell.)

Q. So he owned the entire bankroll of the Nevada Club?

A. On and after he bought his partner's interest.

Q. Do you know when that was? Was it before 1948? A. Yes, it was.

Q. Did you ask him whether or not he had any accounts receivable or payable at the end of those years in question?

A. Yes, I asked him if anyone was indebted to him and if he had loaned anyone monies, and he said no, that he had no accounts receivable. I also asked him about liabilities. He told us about the Joe Rosa note and he again told us about the \$5500 he had borrowed from his father-in-law, Mr. Fortner, in 1950, and those were the only two outstanding he told me about.

Q. You say \$5500 from his father-in-law?

A. That is right.

Q. Did he tell you about any money loaned to him by Mr. White? [191] A. No.

Q. Or Mrs. Craft? A. No.

Q. Was there anything further said at that interview?

A. Well, it was twelve noon, and my closing statement was, I asked Mr. Percifield if he had received any threats or offers of reward in return for the statement, and he said no. I asked Mr. Percifield if we could resume the interview after lunch and we stopped at about 12:20 for lunch.

Q. Did you thereafter meet with him?

(Testimony of James W. Bell.)

A. Yes, we met with Mr. Percifield in the Ace High Club, the same booth, the same three persons present, at about 1:15.

Q. And the same afternoon?

A. The same afternoon.

Q. Let me get that date again.

A. September 30, 1952. I decided to confront Mr. Percifield with certain information we had at the time.

Mr. Anderson: I object to what he decided to do.

Mr. Maxwell: I expect the objection would be sustained.

Mr. Anderson: I move that be stricken from the record.

The Court: Sustained.

A. We had certain information that had been gathered during that preliminary investigation from the Glenwood Springs Bank. They were holding the escrow papers of the Joe Rosa note and at the time of the interview we had a transcript of that note, showing [192] the original obligation and the total monthly payments that had been made on the note in 1948, 1949 and 1950. I said to Mr. Percifield, "The record of this note discloses a reduction in that liability of \$32,880. In view of what you told me this morning about your living expenses, which would be about three thousand dollars a year, which together would amount to some forty-one thousand dollars, and after deducting the \$5500 loan that you told us about, that there was some \$36,000 of monies, of receipts, that had to come from some

(Testimony of James W. Bell.)

source," and I asked him where it came from. He said, "I told you that I gambled, but I didn't know it was that much." He said, "I have taken part in games in Colorado, Wyoming, Montana, Nevada and Utah." He said, "I even left this place for two or three weeks at a time, I have taken part in dice, twenty-one, mostly poker games." I said, "Mr. Percifield, this is serious business." He said, "I know it is, or you wouldn't be here." I said, "Now do I understand you took these trips from time to time and stayed away from two to three weeks at a time?" I asked him, "Are these gambling trips?" He said, "No, I wouldn't want to put it down that way. I don't like the sound of it." I asked him again if he had kept records of his gambling income and he said that he hadn't. I then asked Mr. Percifield if we could draw up an affidavit wherein he would give his explanation for the apparent omission of \$36,000. He said, "I wouldn't want to sign any statement [193] without my attorney." I said, "Well, may we get the information and draw it up that night and meet with you tomorrow at your attorney's office?" He said that would be all right. So I asked him some more about these monthly payments. To begin with, in 1948 he was paying twenty-two-fifty a month and that continued for about eight months. Then it was reduced to fifteen hundred a month for some time and finally reduced to four hundred a month, but I had this transcript before him and I said, "Now this \$2250 a month that you are paying on that mortgage, is that gam-

(Testimony of James W. Bell.)

bling income?" He said, "Well, no, some months I would win more than that, but I had agreed to those payments. It is just like if you owed me a certain amount of money and you agreed to pay so much a month." And we continued to question him about gambling income. I asked him whether he considered the income from illegal sources to be taxable, and he said no, he did not. He said, "This place in Nevada, it is a regular business, and I know I have to pay income tax on it, but I did not know where you go out and win money in a game that you had to pay income taxes." I asked him again about what records had been maintained at the Ace High Club and he told us again about the daily reports. I asked him what had been shown on these daily reports and he said, "Well, receipts." I asked him what they showed and he said bar receipts, cafe receipts and lounge receipts. I said, "As far as other activities of the club, do you know?" He said, "As far as other activities, I do not know." I asked him again [194] whether he considered income from illegal sources as being taxable and he stopped the statement rather abruptly at that time and said, "I don't want to go on answering any more questions. I don't want to go on answering questions without my attorney. He knows far more about these things than I do and I don't want to get on the hook by incriminating myself. So no further attempts were made to question him. I asked him if he could meet us tomorrow morning with his attorney in Meeker and he said

(Testimony of James W. Bell.)

that he would.

Q. Let me ask if anything was said during your interviews which indicated the scale on which he operated, whether small or large?

A. Oh, yes, I remember one statement. We had the transcript of the note account and in specific figures it was \$36,379. He looked at it and said, "Well, I have seen that much on the table at one time; you don't believe that, do you?" I said yes, I did.

Q. Now then, after the conversation was terminated on September 30, 1952, did you thereafter see Mr. Percifield?

A. Yes, we returned to Meeker—Meeker is about 40 miles from Rangely—and spent the night in Meeker and went over to the court house.

Q. At Meeker?

A. At Meeker, about 9:30, October 1st. Mr. Percifield's attorney was the assistant district attorney in that district and he had his offices in the court house. At about 9:30—Mr. Percifield was there—I didn't know Mr. Balcome, Mr. Percifield's [195] attorney at that time.

Q. Who else was there besides Mr. Percifield and yourself?

A. Well, I hadn't gotten to that yet. Mr. Balcome wasn't there at 9:30 so we had to wait. He came in a few minutes later and then Mr. Balcome and Mr. Percifield went into Mr. Balcome's office and we waited out in the hall.

Q. Who is "we"?

(Testimony of James W. Bell.)

A. Revenue Agent M. E. Thomas and myself. We waited about fifteen minutes and Mr. Balcome called us in. He started out the interview, he says, "I am not familiar with tax cases. Just what is it you fellows want?" I said, "Mr. Balcome, we have the 1948, 1949 and 1950 tax returns for Mr. Percifield for investigation," and that we had interviewed Mr. Percifield on the previous day and that he was shown or informed of the Joe Rosa note, which indicated a deduction in that liability of \$32,800 and that his living expenses had been about three thousand a year, making about \$41,000 and we had taken into consideration a loan he had made from Mr. Fortner of \$5,500 and there was some \$36,000 in disbursements and expenditures that were unexplained and Mr. Percifield had said he gambled, that at no time during the interview on the previous day did he know how much, so we asked him for a statement, so we asked him for an affidavit and he said he did not want to sign any affidavit without his attorney, so I said Revenue Agent Thomas and I would like to have his statement in written form so that we could [196] include it in our report. Well, Mr. Balcome was at first reluctant——

Mr. Anderson: We object to "at first reluctant" as conclusion of the witness.

Mr. Maxwell: I think the objection is well taken.

The Court: Objection sustained.

Q. What did Mr. Balcome say?

(Testimony of James W. Bell.)

A. Well, Mr. Balcome did not want to give us an affidavit at first——

Mr. Anderson: I move that be stricken, as conclusion of the witness.

Mr. Brown: I believe that is something the witness can testify to as a matter of impression.

Q. What did Mr. Balcome say?

A. "Well, I would rather not give you an affidavit at the present time," and he turned to Mr. Percifield and he said, "You can be charged with not only filing fraudulent returns, but if you admit to a specified amount and it is more than that, you admit to, you can also be charged with perjury." I said, "Well, we wouldn't ask Mr. Percifield to admit to a specified amount. If he would say on or about \$36,000, that would be sufficient." It was then suggested that Mr. Percifield admit to the amount paid on the Joe Rosa note during this three-year period. Mr. Balcome and Mr. Percifield thought that that would be agreeable——

Mr. Anderson: We move that go out.

The Court: Yes, the part he testified to what he thought. [197]

Q. What did he say?

A. That he thought that would be——

Q. What did he say, not what he thought. Did he say that would be agreeable?

Mr. Anderson: Now, we would object to that on the ground it is leading.

The Court: Now we all understand that sometimes that thought is another way of saying they

(Testimony of James W. Bell.)

said. The words are not words used in their exact sense.

A. They said that that would be agreeable. Mr. Balcome started talking about prosecution. He wanted to know what the procedure was in these cases and he wanted to know whether or not this case was going to be referred to the United States attorney. I answered Mr. Balcome that we were the examining agents, it was our job to gather the information, the facts, the evidence, and present it in the form of a report; that we were not even considering prosecution at that time, and he talked about prosecution some more, but I said, I just informed him that he was far ahead of the issue at the present time.

(At this point defense witness Charles S. Glenn was sworn and excluded from the courtroom.)

Q. Now, Mr. Bell, I think you were in the middle of conversation with Mr. Balcome, Mr. Perci-field, Mr. Thomas and yourself in Mr. Balcome's office in the county courthouse. [198]

A. Yes, sir.

Q. Do you recall where we were?

A. Yes. Mr. Balcome then called for a secretary to come in the office where the four of us were and he started to dictate the affidavit. Towards the latter part of the affidavit, he asked me, "Can you promise, in the event of a trial, that this affidavit will not be used?" I informed Mr. Balcome we

(Testimony of James W. Bell.)

could make no such promise, the evidence gathered during the investigation was beyond our control. He proceeded to dictate the rest of the affidavit. We waited a few minutes for it to be typed, so after it was typed Mr. Balcome wanted to make some corrections, so he said, "Well, let's stop now for lunch; you come back this afternoon and it will be ready for you. So I went over twice that afternoon; the first time was about 2:00 o'clock. Mr. Balcome was not there. I returned about 3:00 o'clock. The affidavit at that time was ready. It was signed, it was notarized and Mr. Balcome gave me, I think, three or four copies of it. Just as I was going out the door he said, "We will come in; you won't have to send the marshal after us."

Q. You have the affidavit? A. Yes.

Q. Was it handed to you in this folder?

A. No, sir.

Q. You have handed me the affidavit which you have referred to [199] in your previous testimony here? A. Yes, sir.

Mr. Maxwell: I offer this in evidence as government's next in order.

The Court: No. 32.

Mr. Anderson: We object to this exhibit or affidavit on the following grounds: That there is no evidence of any warning at the time of signing this purported affidavit that it would be used against the defendant in the event of a criminal prosecution, that the witness' evidence shows that it was not given freely and voluntarily, and upon

(Testimony of James W. Bell.)

the further ground that the purported document includes income from gambling for 1948, 1949 and 1950, without any segregation as to what the amount was in any year.

The Court: The objection is overruled on every ground. The offer is now received in evidence as government's Exhibit 32.

PLAINTIFF'S EXHIBIT No. 32

Affidavit

State of Colorado,

County of Rio Blanco—ss.

Raymond S. Percifield, being first duly sworn, on oath, depose and says:

1. That he is Raymond S. Percifield, the owner and operator of the Ace High Bar and Cafe in Rangely, Colorado, and is a resident of Rio Blanco County, Colorado.

2. That during the calendar years 1948, 1949 and 1950 he neglected to show all income on income tax returns, form 1040, and attached schedules thereto, and that during those years he received personal income in excess of \$36,000.00, part of which additional income is reflected by payments on one certain promissory note given by this affiant as part of the purchase price of the Ace High Bar and Cafe.

3. That the additional income which was not reported during those three years was obtained

(Testimony of James W. Bell.)

from gambling in the States of Colorado, Utah, Wyoming, Montana and Nevada.

4. That this affiant failed to report income received from gambling enterprises during the above years, through ignorance of the requirements of the Internal Revenue Code in that connection, and he is willing at this time to pay all taxes and penalties properly assessable against him in that connection, and states that at no time did he intend to violate any of the provisions of the Internal Revenue Code or defraud the United States Government.

5. That this affidavit is given voluntarily at the request of James W. Bell, Acting Special Agent, United States Treasury Department, and Michael E. Thomas, Internal Revenue Agent, United States Treasury Department.

6. Further Affiant sayeth not.

Witness my hand and seal this 1st day of October, A.D. 1952.

RAYMOND S. PERCIFIELD.

Subscribed and sworn to before me this 1st day of October, A.D. 1952, by Raymond S. Percifield.

[Seal]

ROBERT D. WHITE,
Notary Public.

My commission expires June 4, 1955.

(Testimony of James W. Bell.)

Mr. Maxwell: May it please the Court, may I read the affidavit to the jury?

The Court: You may.

Mr. Maxwell: Entitled "Affidavit," Exhibit 32.

(Reads Exhibit 32.)

Q. Now, after October 1, 1952, Mr. Bell, did you see Mr. Percifield again? A. Yes. [200]

Q. When was that?

A. On October 1st we had picked up some records, his cancelled checks and bank statements, at Mr. Balcome's office, but they requested that they be returned the next day, that is, before we went back to Denver, so Revenue Agent Thomas and I worked on the cancelled checks and bank statements in the hotel room as hurriedly as we could, so we could return in compliance with their request, and at that time we were anxious to get all the records and Mr. Balcome said he would try to get them together for us, so that was October 2nd when we returned to Denver and six or seven weeks went by and we called Mr. Balcome at Meeker.

Q. Perhaps you did not understand my question. I asked you if you saw Mr. Percifield again?

A. I am leading up to it.

Q. Answer the questions as directly as you can. Can you state the date?

A. Yes, on January 25, 1953, we made another trip to Rangely to get the records and we stopped in first to see Mr. Balcome and he didn't have them, so we continued on to Rangely. We stopped at the

(Testimony of James W. Bell.)

Ace High Club and I wanted to ask Mr. Percifield some more questions, one specifically about his automobiles and he then refused to answer any more and he said, "Mr. Herman and Mr. Feinberg are my accountants and he will have to get the records from them." That is all there was to that interview. [201]

Q. Did you get further records, other than the ones you had in the hotel room, which I believe you just testified to?

A. Yes, we did. On February 3, 1953, Mr. Herman brought the records into the Denver office.

Q. Into your office in Denver?

A. That is right.

Q. Was there any one else there?

A. Yes, Revenue Agent Thomas.

Q. What records did you get at that time?

A. Well, he brought one bound book, which contained the check disbursements, the check register for 1948 and 1949.

Q. Let me ask you if that would be the original of Exhibit 30 in evidence?

A. Well, the pages contained in Exhibit 30 are to the front pages in this book, upon which no entries appeared. It isn't a reproduction of the whole book.

Q. In other words, that is a reproduction of the book on which entries appear?

A. That is right. He also brought in another bound book, which was the cash receipts and pay-

(Testimony of James W. Bell.)

outs, but that was for a limited period, beginning in March of 1948 and ending in October, 1948.

Q. I will show you Exhibit 31 in evidence and ask you if that is what you received at that time, or if you received the original of Exhibit 31?

A. Well, that is just like Exhibit 30. The pages in Exhibit 31 [202] are reproductions of those in the original bound book and these are the only pages upon which any entries had been made.

Q. That you saw? A. That's right.

Q. Did you receive any other records at that time?

A. Mr. Herman brought out the deposit slips and bank statements. We were trying to reconcile bank balances——

Mr. Anderson: We object to what they were trying to reconcile.

Mr. Maxwell: This witness is telling what he did.

The Court: Objection overruled.

A. We were trying to reconcile bank balances as of the end of 1947, 1948, 1949 and 1950 and Mr. Herman sat down with us in the conference room and answered what questions we needed to know.

Q. Did he show you cancelled checks?

A. Yes, he would show us a specific check.

Q. But he didn't show you all of them?

A. No, he didn't show us all of them and I asked him if we could keep them for a while to work on.

Q. The cancelled checks?

A. The cancelled checks, and bank statements.

(Testimony of James W. Bell.)

and he said, no, he was going to take those back with him, but we could have the rest of the records

Q. By that, what do you refer to, the rest of the records? [203]

A. Well, check disbursements, the cash book. Then he had some of these daily report forms.

Q. I have photostats here that depict those report forms.

A. Yes, he had daily sheets, such as you have just handed me, for the period beginning October, 1947, up through February 25, 1948. The photostats here——

Mr. Anderson: We object to the “phostostats here.” They are not in evidence.

The Court: They have just been shown to the witness to identify the type of report he received.

Mr. Maxwell: They may be marked for identification at this time.

The Court: I suggest they be marked before he testify.

The Clerk: Plaintiff’s Exhibit 33.

Q. Tell us what Exhibit 33 for identification is.

A. Exhibit 33 is a portion of the daily reports that Mr. Harman furnished to us for examination, but it is only that portion between October 17, 1947, and October 31, 1947. These are reproductions of those pages of those individual reports that are the only pages on which any gambling references are shown and those are the only pages that were reproduced.

(Testimony of James W. Bell.)

Q. Now, those are part of the records of the Ace High Club, is that correct?

A. Yes. [204]

Q. When you said that Mr. Harmon brought the records in, what records were you referring to, the Nevada Club or the Ace High Club?

A. Oh, the Ace High Club. We never did have any records on the Nevada Club.

Q. You never did have? A. No.

Q. Now, you say you had daily cash slips, similar to Exhibit 33, for what period beside the ones that you caused to be photostated?

A. Well, the daily reports, including this period beginning October 17 through February 25, 1948.

Q. October 17th, what year?

A. 1947, through February 25, 1948.

Q. Did you see any daily cash receipts for a later period? A. No, sir.

Q. Were there any other records that Mr. Harmon brought in to let you examine?

A. There were some copies of sales tax returns, some copies of withholding tax returns, some retained copies of employment tax returns, that is all.

Q. What do you mean when you say retained copies?

A. Well, it is the copy that the employer, in case of an employee, retains in his files.

Q. He files the original and this copy he keeps in his file? [205] A. That's right.

(Testimony of James W. Bell.)

Q. Did you receive any records other than those daily cash slips for the month of October, 1947?

A. No, sir.

Q. Did you receive any records showing receipt of gambling income? A. No, sir.

Q. Did you make investigation with respect to the cash on hand which Mr. Percifield may have had on December 31, 1947?

A. Yes, we did. During that first interview we interrogated him about cash on hand and he told us about the bank roll at the Nevada Club and he told us he didn't have any at the Ace High Club except for current expenses.

Q. Did you investigate his financial status immediately prior to December 31, 1947?

A. Prior to December 31st?

Q. Immediately prior to December 31st.

A. Yes, we found, during the investigation, a record of loans——

Mr. Anderson: We object to what they found. Calls for conclusion of the witness; irrelevant and immaterial.

Mr. Maxwell: I think the witness should be permitted to say what he did. I do not think he used the word "found" in a conclusion sense at all.

The Court: The witness may answer. Objection overruled. [206]

A. We examined the records of the clerk of the district court in Elko County, Nevada, and we found loans——

(Testimony of James W. Bell.)

Mr. Anderson: If the Court please, the records would be the best evidence what they found in Elko.

Mr. Maxwell: The records are in evidence, your Honor.

A. We examined the Findings of Fact, which is in evidence as exhibit—I don't know what exhibit number—that shows eleven thousand dollar loan——

Mr. Anderson: If the record is in evidence, if the Court please, it is the best evidence. No use going over that again. He is testifying to what he saw.

Mr. Maxwell: He is testifying as to his examination.

The Court: I think he can summarize what he found.

A. We found a record of a eleven-thousand-dollar loan and the payments that Mr. Percifield had made on it from the time it was originated until the time I looked at the records. We found a record of other borrowed money.

Q. What other borrowed money did you find?

A. I interviewed Mr. Blake Craft and Mrs. Craft at Rapid City, South Dakota——

Q. Now, you can't testify as to what they told you. You found that they made a loan?

A. Yes, I did. I found that Mrs. Craft had made a loan of \$3,500 to her sister, Mossie Percifield. I also found that Clifford White had made a loan to Mr. Percifield of \$2,500 in [207] 1948.

Q. Did you make an investigation in respect to

(Testimony of James W. Bell.)

the non-taxable receipts of Mr. Percifield during the years 1948 and 1949?

Mr. Anderson: Let the witness answer that yes or no, please.

A. Yes.

Q. And other than the loan you have just testified to, what did you find, any other evidence of income that you can recall? A. No.

Mr. Maxwell: That will be all.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Bell, I think you have government's Exhibits 31 and 30 before you? A. That's right.

Q. Will you state again where you got those?

A. Those were supplied by Mr. Herman.

Q. In what form?

A. In a bound book form.

Q. And how many books? A. Two books.

Q. Mr. Bell, you have stated, I believe, in your previous testimony, that you had no records showing any items of gambling income.

Mr. Maxwell: I beg your pardon, the witness did not [208] so testify. I ask that the record be read.

The Court: What is the question?

Mr. Puccinelli: I asked him if he testified he was supplied with no records on which any gambling income was shown.

The Court: I don't recall him so testifying.

A. I believe I did.

(Testimony of James W. Bell.)

Q. You so stated? A. Yes.

Q. These were the records that were given to you, is that correct?

A. They are part of them, yes.

The Court: When you say "these"?

Mr. Puccinelli: That is Exhibit 33 for identification.

A. That is a part of them, yes.

Q. You read the third page of that, did you?

A. I testified that these are the only pages upon which any gambling was shown.

Q. And they were the only pages which were reproduced. I believe it was in your testimony that gambling income is shown? A. Yes, sir.

Q. Now, I believe you stated further—do I understand you correctly, Mr. Bell, to state that the only record you had showing gambling income was for October? Am I quoting you correctly?

A. I believe you are. [209]

Q. Do I, therefore, understand your testimony to be then, Mr. Bell, that these are the only daily bar receipts received?

Mr. Maxwell: Objected to as repetitious. I think that is the third time this question has been asked and answered.

The Court: It is repetitious. You may answer.

A. No, I received sheets similar to this for the period beginning in October, 1947, and ending February 25, 1948.

Q. Then I take it those are not all of those to which you testified? A. No.

(Testimony of James W. Bell.)

Q. There are others? A. Yes.

Q. I will show you what has been marked defendant's Exhibit F in evidence and ask you if you have seen that before? A. I don't recall.

Q. Will you state the date on that?

A. November 1, 1947.

Q. That encompasses the period of time for which daily records had been furnished to you?

A. Yes, sir.

Q. Is there gambling shown on that?

A. Yes, sir.

Q. Then you were mistaken, were you not?

A. Yes, sir.

Q. Mr. Bell, just so I have this straight in my own mind, you [210] got these daily bar receipts—what date was that?

A. October 17, 1947.

Q. You didn't have any from September 30, 1947?

Mr. Maxwell: Objected to as repetitious.

Mr. Puccinelli: I will withdraw the question. I guess he has answered the question.

Q. You stated then that you received employment tax returns for various dates?

A. The retained copies, yes.

Q. And you received sales tax returns for various dates?

A. That's right, the retained copies.

Q. Did you receive any other material?

A. Retained copies of the withholding tax returns, yes, we did. There is one thing I forgot—we

(Testimony of James W. Bell.)

had some miscellaneous records, that is, invoices, memoranda, I forget just in what form they were presented to us, but we did have them.

Q. Is that all? A. That's all I remember.

Q. You don't know. Are you absolutely as certain as to that as you are to any other——

Mr. Maxwell: Objected to as argumentative, your Honor. He has answered it three times.

Mr. Puccinelli: I ask that this be marked for identification.

The Clerk: Defendant's M for [211] identification.

Mr. Brown: May we examine the offer, counsel?

Mr. Puccinelli: You certainly may.

Q. I hand you what has been marked defendant's Exhibit M for identification and ask you if you can identify that?

A. That is receipt I gave Mr. Herman on February 7, 1953, when he brought the records in to us.

Q. In whose handwriting is that?

A. Mine.

Q. Completely? A. Yes, sir.

Q. Will you read that, please?

Mr. Maxwell: Objected to—that is not in evidence.

Mr. Puccinelli: I will offer it in evidence.

Mr. Maxwell: No objection.

The Court: The offer will be received in evidence as defendant's Exhibit M.

Q. Will you read that, please?

(Witness reads Exhibit M.)

(Testimony of James W. Bell.)

A. I was mistaken.

Q. Were you also mistaken as to the first statement?
A. No, sir.

Q. I ask you to read the first statement.

A. I might have been. This says 9-30-47 and the first photostat is October 17, 1947.

Q. Will you read the next one?

A. Gambling receipts, check register, October November, December, 1947; cash pay-outs, October November, December, 1947. [212] Bank records reconciliation, January through August, 1948.

Q. I will ask you if you were mistaken as to that?
A. Yes, I was.

Q. Will you read the next?

A. 4. Employment tax returns, quarter ending 6-30, 48, 9-30, 12-31, 3-31-48 and 2-4-49. No. 5 is sales tax returns, all in 1948; November, 1947; January to April, 1949; February, March and August, 1949. Daily recaps, January 1 to December 31, 1951.

Q. I ask you if you were also in error as to that?

Mr. Brown: I will object to the form of the question.

The Court: Reframe your question.

Q. I will ask you to read the last item mentioned.

A. Well, that is daily recaps for 1951. I think I was mistaken about not including that.

Q. One more item with reference to this same defendant's Exhibit M. What is the date on that receipt?
A. February 2, 1953.

(Testimony of James W. Bell.)

Q. Is that the date on which you met with Mr. Herman?

A. Yes—well—I don't think he was there more than one day; he may have been there two days. As I remember, it was February 3rd that he came there.

Q. The receipt shows February 2nd?

A. Yes.

Q. That is what you testified to?

A. Yes. [213]

Q. The receipt shows February 2nd?

A. Yes.

Mr. Puccinelli: That is all.

Mr. Maxwell: No redirect.

(Witness excused.)

MICHAEL E. THOMAS

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, please?

A. Michael E. Thomas.

Q. What is your occupation?

A. Internal Revenue Agent.

Q. Where do you reside, sir?

A. Denver, Colorado.

Q. Did you have occasion to examine the cancelled checks and bank ledger sheets of the defend-

(Testimony of Michael E. Thomas.)

ant, Raymond Percifield? A. I did.

Q. Did you compare those records and make a comparison of the outstanding checks?

A. I did.

Q. Of Mr. Percifield for the years 1948 and 1949? A. I did.

Q. Do you have your work papers with you on that? A. I do.

Q. Will you refer to those, please? These cancelled checks and [214] bank ledger sheets that you had were on what bank, if you recall?

A. They were drawn on the First State Bank of Rangely.

Q. Are they what are commonly referred to as the Ace High Club checks? A. That's right.

Q. Did you see at any time the Nevada Club checks? A. No, sir.

Q. In your examination of the cancelled checks for the Ace High Club and the comparison of the bank ledger sheets, did you determine the outstanding checks on December 31, 1947? A. I did.

Q. What checks did you find to be outstanding at that time?

A. At that time I found the following checks to be outstanding: Check No. 88——

Mr. Anderson: We object to reading from the record, if your Honor please; it is not in evidence.

Mr. Maxwell: He is reciting from his work papers.

The Court: You may continue.

A. Check No. 88, amount \$19.95; check No. 100,

(Testimony of Michael E. Thomas.)

in amount \$2.50; check No. 101, in amount \$4.29; check No. 102, in amount \$5.00; check No. 105, in amount \$30.55; check No. 109, in amount \$105; check No. 112, in amount \$60.70; check No. 113, in amount \$45.50; check No. 116, in amount \$314.13; total amount of \$587.62. [215]

Q. That was on what date?

A. As on December 31, 1947.

Q. Now, did you make a similar investigation as to the date December 31, 1948? A. Yes.

Q. What did you find in that respect?

A. At that time the following checks were outstanding: No. 518, \$2.50; No. 524, \$50.00; No. 526, \$31.55; total amount of \$84.05. There was also a bank service charge, typed memorandum, in amount of \$10.00. These last two checks, No. 524 in amount of \$50 and 526 in amount of \$31.55, and typed memorandum were not deducted on the bank statement until January, 1949.

Q. So as far as the bank record is concerned, they were outstanding? A. That is right.

Q. Did you make similar determinations as to December 31, 1949? A. I did.

Q. And what did you find as to that date?

A. The following checks were outstanding: December 31, 1949, dated April 18, 1949, check No. 585, \$44; check dated June 16, 1949, No. 595, in amount of \$306; check dated December 26, 1949, no number shown, in amount of \$9.40; another check dated December 26, 1948, no number, in amount of \$134.09; check dated December 27, 1949, no number

(Testimony of Michael E. Thomas.)

shown, in amount of \$25. Check dated December 27, 1949, no number shown, in amount of \$5.00, and check dated [216] December 12, 1949, no number shown, \$172.23; total amount of \$695.72.

Mr. Maxwell: That's all.

(Jury admonished and recess taken at 3:00 o'clock.)

3:30 P.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.)

MR. THOMAS

resumes the witness stand on

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Thomas, you have testified as to the records in the First State Bank at Rangely, is that right? A. Yes, sir.

Q. And I believe you stated those were the only records that you received—I am trying to get back into place and find out where we were.

Mr. Maxwell: The witness testified he had seen the cancelled checks and bank statements on the Ace High Club at Rangely and had determined the outstanding checks from those.

Q. Did you see any other records of any other bank?

(Testimony of Michael E. Thomas.)

A. I saw the bank statements on the Nevada Bank of Commerce.

Q. Had you checks from any other bank?

A. No, sir.

Q. Did you ask any one for them?

A. No, I asked Mr. Percifield for his records the first time I interviewed him, for all of his records. [217]

Q. When was that?

A. That was in February, 1953.

Q. That is the first time you saw him?

A. Yes, sir.

Q. Specifically, Mr. Thomas, did you ask for the Nevada Bank of Commerce statements?

A. No, sir, at that time I didn't have the banks Mr. Percifield had.

Q. Mr. Thomas, are you the Michael E. Thomas named—I show you what has been marked plaintiff's Exhibit 22 in evidence, and ask you if you are the same M. P. Thomas named therein?

Mr. Maxwell: Objected to as beyond the scope of direct examination. This is not a matter which Mr. Thomas has testified to. We had another witness testify to that affidavit and I think the matter has been available to cross-examination by Mr. Puccinelli.

Mr. Puccinelli: May I make this observation—I have noted in the past where cross-examination has often drifted away from the whole scope of the direct.

The Court: That is true, that sometimes we fall

into that habit to expedite matters. This, of course, is not proper cross-examination, as the Court looks at it. This witness is confined solely to the comparison and correlation of checks.

Mr. Maxwell: Outstanding checks, yes, sir. [218]

The Court: I permit that merely to expedite the case.

Mr. Maxwell: I have no questions.

The Court: Now, as I understand the situation, gentlemen, the government is not at the moment prepared to go forward and it is understood that the defendant will take the opportunity to call certain of its witnesses out of order for the remainder of the afternoon. Is that right?

Mr. Anderson: Yes, your Honor, that is right.

The Court: Very well; let the record show that is stipulated by counsel.

CHARLES S. GLENN

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Puccinelli:

Q. Will you state your name?

A. Charles S. Glenn.

Q. Where do you live, Mr. Glenn?

A. Elko.

Q. How long have you lived there?

A. About 11 years.

Q. What is your occupation?

(Testimony of Charles S. Glenn.)

A. Wholesale beverages.

Q. For what company?

A. Peraldo Distributing Company.

Q. In what capacity do you work? [219]

A. Manager.

Q. Of the local branch?

A. Peraldo Distributing Company in Elko.

Q. You are appearing here, are you not, Mr. Glenn, under subpoena to testify on behalf of the defendant? A. I am appearing on subpoena.

Q. As part of that subpoena, you were asked to bring certain records, is that right?

A. That is correct.

Q. Do you have those records with you?

A. I do.

Q. May I see them? I ask that this be marked defendant's next in order.

The Clerk: Defendant's N.

Mr. Maxwell: May I ask the witness on voir dire?

Q. (By Mr. Maxwell): Does this document, marked defendant's N for identification, consist of all of your records with respect to the account of the Nevada Club at Wendover, Nevada, for the years 1948 and 1949?

A. That represents all the transactions.

Q. It also has information as to transactions in prior years, does it not?

A. Yes, that is the complete record of transactions.

Q. And the first entry I see here is October 11,

(Testimony of Charles S. Glenn.)

1949? A. That is right. [220]

Q. And there is a balance shown in the account of how much? A. \$1,133.04.

Q. Was that still owing at the end of the year 1949? A. That is correct.

Q. What is the business of your company, sir?

A. What is the business?

Q. Yes.

A. Wholesale distributors of beer, wines, liquor and soft drinks.

Mr. Maxwell: We have no objection. I thought you had offered it, counsel.

Mr. Puccinelli: No.

Mr. Maxwell: Do you intend to offer it?

Mr. Puccinelli: Oh, yes. I offer this in evidence, if your Honor please.

The Court: The offer will be received in evidence as defendant's Exhibit N.

Q. (By Mr. Puccinelli): Now, I will ask you to state, Mr. Glenn, what it is.

A. Well, it is a ledger card, showing all the transactions of the business of the Peraldo Distributing Company with the Nevada Club during the years indicated on the card.

Q. Nevada Club, where?

A. At Wendover, Nevada.

Q. I will ask you, Mr. Glenn, will you give me the account [221] balance as of the last day in December, 1947, account balance as of the last day in December, 1948, and account balance as of December, 1949, or the last entry of 1949.

(Testimony of Charles S. Glenn.)

A. The balance December, 1947, was \$322.94; December, 1948, \$1,654.79, and there is no December date in 1949. October——

Q. Just read the last date.

A. The last entry I have was \$1,133.04.

Q. As of what date?

A. October 11, 1949.

Mr. Puccinelli: That is all.

Cross-Examination

By Mr. Maxwell:

Q. Do you know the defendant, Raymond Percifield? A. Yes, I do.

Q. Do you deal with him in furnishing liquor, wine and other bar supplies?

A. That is correct.

Q. Do you deal with any one else?

A. You mean at that time?

Q. Yes.

A. Yes, when Mr. Percifield wasn't there, whoever was in charge I dealt with, whoever was in charge.

Q. Now, did you receive payments on that account from time to time, as shown on this ledger sheet? A. Yes, as indicated.

Q. Were those payments by check or by cash?

A. Well, I would just have to say both. I couldn't recall. [222]

Q. Do you recall on occasion receiving cash?

(Testimony of Charles S. Glenn.)

A. That is pretty difficult to answer. I would say I did, yes. Cash and checks.

Q. Do you recall on occasion receiving checks?

A. I received checks mostly from Mr. Percifield when he was there. When he wasn't there, when I asked for the manager, I received cash.

Q. Do you have any records which would reflect the nature of those payments?

A. I am afraid I don't. They are a little too old.

Q. You have destroyed all your records for 1948 and 1949?

A. I think I have. I don't intend to keep them over five years.

Q. How does it come you saved those?

A. Those ledger cards there we keep.

Q. You retain all your ledger cards?

A. Well, I might put it this way—this bill has never been paid. It is in the ledger cards account unpaid bills.

Mr. Maxwell: That is all.

Mr. Puccinelli: That is all.

(Witness excused.) [223]

WILLIAM W. SMITH

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. Mr. Smith, you have heretofore been sworn with other witnesses in this case? A. I have.

(Testimony of William W. Smith.)

Q. How long, Mr. Smith, have you known Mr. Percifield?

A. I wouldn't say for sure, but I would say for twenty years, or a little more. I knew of him longer than that, but I knew him personally that long.

Q. What business was he in at that time?

A. In the contracting business.

Q. Did he have any equipment at that time?

A. Yes, I couldn't tell you what, but I know that he delivered groceries around town, some kind of a panel job, and he also had a truck.

Q. Do you know up to what date he continued in the trucking business?

A. No, I wouldn't know.

Q. Approximately what year?

A. No, you would have to ask him that. I wouldn't venture a guess on when it was. It was several years he had it.

Q. Where did he live then?

A. About a block of where I lived.

Q. How long did he live there, about?

A. Well, I can't tell you. [224]

Q. A year or two or three?

A. I would say longer than that.

Q. From about when to about when?

A. Well, that would take a little figuring. I would say it was anywhere from '36 or '37 on to—I can't tell you.

Q. Are you acquainted with his general reputation in that community at that time?

(Testimony of William W. Smith.)

A. Oh, I think so. I never knew anything bad of him.

Q. And I assume then your answer would be his reputation was good if you didn't know anything bad about him.

A. That is right, so far as I know.

Mr. Anderson: That's all.

Cross-Examination

By Mr. Brown:

Q. Mr. Smith, did you know Mr. Percifield in 1948 and 1949? A. Yes, sir.

Q. You lived in the same town with him?

A. No, I don't believe so. I don't believe he was there at that time.

Q. Do you have any recollection of his reputation in 1948 and 1949?

A. No, I can't swear I saw him in those years. I probably did; he could have been there.

Mr. Brown: I think, your Honor, in view of the statement of Mr. Smith, that he had no knowledge of the reputation, or that he had a reputation in 1948 and 1949, we will have to move that his testimony be stricken.

Mr. Anderson: We submit, if the Court please, it might [225] affect the weight, but not the admissibility.

Mr. Brown: Well, now, he testified they lived in the same town, a few block away from each other, and Mr. Percifield was in the trucking business, in what year I don't recall; I don't think he said.

(Testimony of William W. Smith.)

Mr. Anderson: He said starting in the thirties and didn't say what year it was.

A. I wouldn't venture to say what year. I can't remember. It was some time in that time, because I moved into Gillette in 1935 and he was there at that time.

Mr. Brown: I think, your Honor, it is too remote.

The Court: I realize it is very remote. I am going to permit it. Motion denied.

Mr. Anderson: There is one question I would like to ask.

Mr. Brown: May I finish my cross-examination?

Mr. Anderson: Oh, yes, I thought you had finished.

Q. Now, in connection with your opinion as to his reputation, have you heard that he gambled or ran gambling games at the Ace High Club in Rangely, Colorado?

Mr. Anderson: May our objection heretofore made to this also go to this evidence, too?

The Court: The record will note the objection made to this line of questions.

A. No, I knew nothing about his [226] operations.

Q. You never heard about it—you didn't know him in 1948 and 1949?

A. If I knew him in 1935, I knew him in 1948.

Q. You didn't know his activities at that time?

A. No, I wasn't personally acquainted with that.

Q. What is the last time you saw him?

(Testimony of William W. Smith.)

A. Well, I don't know. His mother was in the hospital and I went up to the hospital and notarized some papers because his mother wasn't able to come to the office.

Q. Calling your attention to 1948 and 1949, how long was it prior to the year 1948 that you had seen him? A. Well, I wouldn't say.

Q. Well, was it one year or two years or five years or ten years?

A. No; I wouldn't answer that question because I perhaps saw him every year; I could have saw him every year, but I wouldn't swear. I saw him on occasions.

Q. You lived in the same community. How many years since you lived in the same community prior to 1948?

A. Well, I wouldn't say that either. I don't know what year he left there. He must have left there around the early part of the forties, but I am not sure about that.

Q. Just what do you base your testimony upon, as to his reputation?

A. Well, I saw him almost every day when he was in the trucking business. He hauled for concerns around there and made [227] deliveries and also for the express company.

Q. This was in what year?

A. Some time after '35 that I was in town.

Q. Before what year, to the best of your recollection?

(Testimony of William W. Smith.)

A. I wouldn't attempt to say. There were several years there, but I wouldn't say how many.

Q. Are you sure he had a general reputation during those years?

A. Well, a little town like that, he would have or I would have known different.

Q. He just had a general reputation—would you characterize it?

A. I never heard anything bad about him.

Q. Did you ever hear anything good about him?

A. Well, a lot of people you don't hear anything good about.

Q. Just answer my question, to the best of your recollection.

A. Well, I wouldn't say one way or the other.

Mr. Brown: I think that is all.

Redirect Examination

By Mr. Anderson:

Q. Mr. Smith, did Mr. Percifield own the house there when he lived half a block from you?

A. I think he owned that house; I am quite sure he did.

Q. Do you know about what the value of the house was?

Mr. Brown: Objected to—that exceeds——

A. No, I wouldn't——

The Court: Objection sustained.

Mr. Anderson: That is all.

(Witness excused.) [228]

WILLIAM H. ELAM

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. Please state your name for the record.

A. William H. Elam.

Q. Where do you live, Mr. Elam?

A. Rangely, Colorado.

Q. How long have you lived in Rangely?

A. I have been in Rangely since 1948.

Q. What official position, if any, do you hold?

A. I am mayor of the town of Rangely.

Q. How long have you been mayor?

A. It will be two years in April.

Q. Do you know Raymond Percifield?

A. I do.

Q. How long have you known him?

A. I have known Mr. Percifield personally since about 1950.

Q. Are you acquainted with his general reputation in the community where he lives, there in Rangely? A. Yes, I am.

Mr. Brown: I will have to object on the ground no proper foundation has been laid. I submit it must be established first if he has a general reputation in the community.

The Court: Well, I think it is just a question of which comes first. The objection will be [229] overruled.

(Testimony of William H. Elam.)

Q. Is his general reputation good or bad?

A. Very good.

Mr. Anderson: That's all.

Cross-Examination

By Mr. Brown:

Q. Mr. Elam, you said you are mayor of Rangely, is that correct? A. That is correct.

Q. And that you have been mayor for approximately two years, is that correct?

A. That is right.

Q. And you have been there since 1948 and know Raymond Percifield since that time?

A. Personally since that time. I knew him prior to that also.

Q. You have also testified that his general reputation is good, is that correct? A. Yes, sir.

Q. Now, I ask you if gambling is allowed in Rangely?

Mr. Anderson: Objected to as incompetent, irrelevant and immaterial, beyond the scope of direct examination.

The Court: Objection overruled.

A. Will you repeat the question, please?

Q. I asked you if gambling is allowed in Rangely?

Mr. Anderson: We submit it is irrelevant and immaterial on the matter involved here.

The Court: Objection is sustained.

Q. In 1948 was gambling allowed in [230] Rangely?

(Testimony of William H. Elam.)

A. Yes, it was, to the best of my knowledge.

Q. Were you there in 1948? A. I was.

Q. Did you ever observe gambling there at that time, '48? A. When?

Q. And during 1949? A. Yes, sir.

Q. Did you ever observe Mr. Percifield engage in gambling activities in Rangely during 1948 or 1949?

A. Yes, I knew there was gambling at the Ace High; all of the places.

Q. And that did not affect his reputation in Rangely?

Mr. Anderson: We object to that as argumentative.

Mr. Brown: I withdraw the question.

Q. Does that have any bearing on your answer as to whether his reputation is good?

A. It does not. At that time there was gambling at all the clubs in Rangely. They were donating to the town and as far as I am concerned, it does not bear on his reputation.

Q. You say they were donating to the town?

A. That is what I understand.

Q. But you don't know? A. I don't know.

Q. It was generally done in Rangely at that time, gambling was? A. Yes, sir. [231]

Q. Even though it was illegal? A. Yes, sir.

Mr. Brown: I think that is all.

Mr. Anderson: That is all.

(Witness excused.)

HUGH L. CALDWELL

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. State your name to the Court and jury, please. A. Hugh L. Caldwell.

Q. Where do you live, Mr. Caldwell?

A. I live on a ranch about half way between Meeker and Rangely.

Q. Do you hold any official position in Rio Blanco County, Colorado? A. I do.

Q. What is that position?

A. County commissioner.

Q. How long have you been county commissioner? A. About 17 years.

Q. Are you such now? A. Yes.

Q. Do you have reason to go to Rangely often?

A. Yes.

Q. Is Rangely in your district of the county, as county commissioner? A. Yes. [232]

Q. Do you know the defendant, Raymond Perci-field? A. Yes, I do.

Q. How long have you known him?

A. Well, I think it has been eight or nine years.

Q. Are you acquainted with his general reputation in Rangely where he lives? A. Yes.

Q. Is that reputation good or bad?

A. Good.

Q. I will ask you, Mr. Caldwell, what kind of

(Testimony of Hugh L. Caldwell.)

a place is Rangely, as to whether it is a boom town or——

Mr. Maxwell: I object as calling for conclusion of the witness.

The Court: I think by virtue of his general knowledge and position in the community, he can testify.

A. Really, there wasn't any town until after '50; approximately ten families.

Q. You say 1950? A. Or '40, pardon me.

Q. And after that what happened?

A. Well, that is when the oil companies came in to produce the oil field; Rangely is on the edge of the field.

Mr. Brown: We object to that as irrelevant and immaterial; has no bearing upon any issue in this case.

Mr. Anderson: We submit it does have a bearing on the issues in this case. [233]

The Court: What is the purpose, counsel?

Mr. Anderson: To show that after Mr. Percifield purchased the Ace High Club the boom was off and business dropped off.

The Court: We are getting pretty technical with that expression "boom" and I think we can circumvent that part of the testimony. If you want to show the change that took place or amount of falling business, I think that is pertinent.

Mr. Anderson: Very well, I will try to do it that way.

Q. After the development of the oil field came

(Testimony of Hugh L. Caldwell.)

in and the town filled up, was the population increased? A. Yes.

Q. Do you know to what extent, Mr. Caldwell, in area of the oil field there?

Mr. Brown: Would you request counsel to place the date and time, please, your Honor?

The Court: Yes, I think you should direct the witness' attention to a definite period, counsel.

Mr. Anderson: He testified it was after 1940.

Q. When did the development of those fields begin, about when? A. About '44 and '45.

Q. And at that time do you know about to what extent the population in that community [234] increased?

A. I would say approximately five thousand people lived there at the peak.

Q. And about how long did this development work of the oil field continue?

A. I think '47 was the last year; '48, possibly it went up a little.

Q. And after, what was the population around?

A. Probably two thousand in the area.

Q. At what time, Mr. Caldwell, about?

A. Well, it is hard to give definite dates, but it happened all at once, possibly two years—'49 would be the smallest population there was.

Q. How about '48, the population?

A. Possibly not quite as low as '49, but down, way down.

Q. I show you what has been marked as de-

(Testimony of Hugh L. Caldwell.)

fendant's Exhibit O and I will ask you to examine that and see if you know what it is?

A. It is a treasury receipt of taxes paid.

Q. What county? A. Rio Blanco.

Q. Do you know the treasurer's signature?

A. I do.

Mr. Anderson: We offer this Exhibit O in evidence.

Mr. Maxwell: Your Honor, I object. The document is not sufficiently identified, especially as to date.

The Court: I do not think there is a proper foundation there. [235]

Mr. Anderson: We believe the exhibit itself shows the dates it covers. He says he knows what it is and knows the treasurer's signature.

The Court: Does the defendant know?

Mr. Anderson: Oh, yes, he would know.

The Court: The Court will permit it to be entered. Objection overruled.

Mr. Maxwell: Well, if the Court please, it is intended to show a payment, I believe, in 1950, which is completely immaterial. Paying taxes for 1948, that he owed at the end of 1948 and paid in 1949.

Mr. Brown: We submit that could have been certified to, could have been presented to us.

Mr. Anderson: It is the original.

Mr. Maxwell: Furthermore, may it please the Court, this return showed Mr. Percifield was a cash basis taxpayer and what taxes he owed at the end

(Testimony of Hugh L. Caldwell.)

of '49 is completely immaterial to this case. What taxes he paid during 1948 and 1949, they might be material.

Mr. Anderson: I thought we were proceeding on the net worth basis on obligations and payments and that is an obligation he owed at that time, and would be properly deductible.

Mr. Brown: If he states it is the original document, your Honor, how did it get here? It is strictly hearsay.

The Court: There is, as far as the Court observes, no official stamp on this, so it could be a fugitive paper. [236]

Mr. Anderson: I would like to ask one more question.

Q. Mr. Caldwell, do you know whether or not this is an original tax receipt?

A. It certainly looks like it is.

Mr. Brown: May I inquire on voir dire?

The Court: You may?

Q. (By Mr. Brown): Do you, in Rio Blanco County, Colorado, hold the position as treasurer or as deputy treasurer? A. No.

Q. Are you familiar with the functions of those offices? A. Well, reasonably well.

Q. On what do you base your statement, "reasonably well"?

A. Well, I haven't worked in any of the offices, but we do have to co-operate with the other offices.

Q. You are not familiar with the functions of

(Testimony of Hugh L. Caldwell.)

that office in any capacity as acting as treasurer, other than as commissioner, is that correct?

A. That is right.

The Court: You have nothing to do with the mechanics of taxes, have you, other than, I assume, you set rates, as we do here?

A. Yes

The Court: You had nothing to do with the collections?

A. Not ordinarily.

The Court: What do you mean, not ordinarily?

A. Well, unless something goes to the [237] taxpayer.

The Court: I am speaking of collections; and you are not custodian of any of the documents, such as we have here?

Mr. Anderson: To save time, we will put this in by another witness later. Very well, the offer has been withdrawn.

That's all.

Mr. Brown: We have no cross-examination.

(Witness excused.)

ROBERT FULTON

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Anderson:

Q. Will you state your name?

A. Robert T. Fulton.

Q. Where do you live, Mr. Fulton?

A. Meeker, Colorado.

Q. How long have you lived there?

A. Thirty-nine years.

Q. Do you hold any official position in the county in which Meeker is located? A. I do.

Q. What county do you hold this position in?

A. Rio Blanco County.

Q. And what position do you hold?

A. Sheriff of Rio Blanco County.

Q. For how long have you been sheriff of Rio Blanco County? A. Eight years. [238]

Q. Over what period?

A. January 14, 1947 to January 13, 1955.

Q. Are you acquainted with the defendant, Raymond Percifield? A. I am.

Q. How often, in your official capacity, have you visited his club?

A. Oh, at least once a week; quite often.

Q. Are you acquainted with the general reputation of Mr. Percifield in Rangely, Colorado?

A. I am.

Q. Is that reputation good or bad?

(Testimony of Robert Fulton.)

A. It is good.

Q. Were you in Rio Blanco County before the development of the Rangely oil field?

A. I was.

Q. About when did that development commence?

A. It started in about 1945.

Q. About how long did the development go, up to what year?

A. The big boom wasn't until the middle of '48. The drilling program was over; the boom started to take off.

Q. Was this depreciation a sudden process or gradual?

A. It was quite sudden. Actually the drilling was over, the rigs were moved.

Q. And employees, what did they do?

A. They left with the rigs.

Mr. Anderson: Cross-examine. [239]

Cross-Examination

By Mr. Brown:

Q. Mr. Fulton, as sheriff of Rio Blanco County, you knew Mr. Percifield? A. I did.

Q. Did you know him during 1948 and 1949?

A. I did.

Q. And you went to Rangely approximately once a week, is that correct?

A. At that time I went probably four or five times a week.

Q. Did you have a deputy down there at all times? A. Had one deputy, yes, sir.

Q. Are you familiar with the Ace High Club

(Testimony of Robert Fulton.)

in Rangely? A. I am.

Q. What was it? A. A bar and cafe.

Q. Was it a gambling establishment?

A. To my knowledge, I never saw any gambling.
I heard rumors, never saw any.

Q. Just rumors?

A. Heard rumors of gambling all over at that
time.

Q. That is when you were sheriff?

A. Yes.

Q. And you were in there four or five times a
week?

A. I wouldn't say I was in the Ace High.

Q. In Rangely? A. Yes. [240]

Q. Did you ever investigate those rumors?

A. No.

Q. You never arrested Raymond Percifield for
gambling? A. No.

Q. How often did you go in his club?

A. About once a week.

Q. And you saw no gambling in there?

A. No.

Q. You arrested others, but you didn't arrest
Mr. Percifield?

Mr. Anderson: We object to that, if the Court
please, as repetitious. That is what he said.

Mr. Brown: That is all.

Mr. Anderson: That is all we have at this time,
your Honor.

(Jury admonished and recess taken at
4:00 p.m.)

February 17, 1956—11:00 A.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.)

The Court: You may proceed.

FORREST P. CALKINS

a witness on behalf of the government, duly sworn,
testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, please?

A. Forrest P. Calkins.

Q. Have you been previously sworn? [241]

A. Yes, sir, I have.

Q. Where do you reside, Mr. Calkins?

A. Los Angeles, California.

Q. What is your occupation?

A. Technical adviser to the Regional Counsel
for the San Francisco region.

Q. At Los Angeles?

A. At Los Angeles, yes, sir.

Q. How long have you been so employed?

A. On permanent assignments since October of
1955. Temporary detail since January, 1953.

Q. Where were you employed prior to your occupation as technical adviser to the chief counsel's office?

A. Internal Revenue Agent's office in Los Angeles. I was employed as Internal Revenue Agent.

(Testimony of Forrest P. Calkins.)

Q. When were you so employed?

A. November 15, 1949.

Q. Have you had any accounting education, sir?

A. Yes, sir; I have had six years.

Q. At the University?

A. Yes, sir; Pasadena two years; U. C. L. A. two years and two years at Southwestern.

Q. Have you ever testified as an expert witness at any income tax trials?

A. Yes, sir, I have.

Q. On criminal or civil? [242]

A. Criminal and civil.

Q. Before what courts?

A. The district court of the Southern District of California and tax courts of the United States.

Q. And were you qualified as an expert in those trials? A. Yes, sir, I was.

Q. Mr. Calkins, have you been in attendance at this trial throughout the testimony?

A. Yes, sir.

Q. Have you examined the documents placed in evidence? A. Yes, sir, I have.

Q. And listened to all of the testimony?

A. Yes, sir.

Q. Have you examined the records placed in evidence here, the records of the defendant placed in evidence here? A. Yes, sir, I have.

Q. Can you tell me what basis those records are kept on, in accounting terms?

A. On the cash basis.

(Testimony of Forrest P. Calkins.)

The Court: Counsel, you are referring to the defendant's records?

Mr. Maxwell: The defendant's records, yes, your Honor.

Q. Now, more specifically, I am referring to Exhibit 31 and Exhibit No. 30. Those records, you say, are kept upon the cash basis? [243]

A. Yes, sir. I notice, in going through them, certain items charged to the accounts payable. Accounts payable would indicate an accrual basis, but from the record we have, there apparently was no way of actually maintaining accounts payable.

Q. I wonder if you would explain that, what those accounts payable have to do, whether the basis is cash or accrual? A. Well—

Q. Let us start this way—let us explain what the difference is between cash basis and accrual basis.

A. In the simplest form, in the cash basis, the money becomes taxable when it is paid or received, is a taxable item at the time of payment and is a deduction for income tax purposes, whereas, on the accrual basis, the income is taxable to the individual or taxpayer at the time it is earned rather than received and the expense is a liability as a deduction at the time the liability is incurred, rather than when the liability is paid.

Q. So that if you owed a bill, for example, at the end of a time and had not yet paid it, if you were on the accrual basis, if you had not paid the bill, but you owed it, if you are on the accrual basis, it

(Testimony of Forrest P. Calkins.)

has become an expense then deducted, but if you are on the cash basis, it is not yet deducted until you pay it? A. That is right.

Q. Have you examined the income tax returns for the years 1948 and 1949 in evidence here?

A. Yes, sir, I have. [244]

Q. Those are Exhibits 1, 2 and 3, is that correct? A. Yes, sir, that is correct.

Q. Now, can you tell whether those returns were made on the cash or accrual basis?

A. With the exception of inventory items, they were made on the cash basis.

Q. Will you explain your answer with reference to inventory items?

A. Well, inventory items, stock in trade is the major income producing factor and at the time you have inventory at the beginning period, you add to this purchases during that period; at the end of the period you still have a certain inventory on hand, then you subtract from that. In other words, that item was not sold, you still have that on hand.

Q. And when you subtract what you have on hand from purchases during the year, plus the inventory at the beginning of the year, what figure do you reach? A. Cost of goods sold.

Q. What relation does that have to accrual and cash basis?

A. It is in effect future inventory as an accrual item.

Q. Then in view of the fact that inventories are set out in the 1948 return, I believe you said——

(Testimony of Forrest P. Calkins.)

A. Yes, sir.

Q. ———does that have any effect as to whether the income tax returns for that year were on a cash or accrual basis?

A. I believe it would be what we generally refer to as a hybrid [245] system; that is, all items, with the exception of inventory, are treated on a cash basis. Inventories are treated on accrual basis.

Q. From what books and records you have seen in evidence here, can you tell me whether or not those books and records would be adequate to properly reflect income, provided they were complete in all respects?

A. Well, yes, sir, I believe they would.

Q. Would the commissioner of Internal Revenue have the right to change the accounting basis of the taxpayer in this instance, assuming that the books were clear and reflect income?

A. Referring to these books?

Q. Yes, sir.

A. No, I don't believe he would.

Q. In other words, the Commissioner of Internal Revenue, when computing Mr. Percifield's income, would be required to use the same hybrid system for the year 1948? A. Yes, sir.

Q. Now, what is the situation as to the year 1949? I refer you to the income tax return.

A. The year 1949 profit and loss statement, attached to the income tax return itself, as such, would have a net figure I mentioned before, cost of goods sold. I cannot tell whether that was pur-

(Testimony of Forrest P. Calkins.)

chases or whether inventory plus purchases, less ending [246] inventory, resulting in cost of goods sold.

Q. Do the books tell you whether or not, Exhibits 30 or 31, an inventory was taken?

A. No, sir, they do not.

Q. Would it be possible for gambling income to be on other than a cash basis? In other words, could that be on an accrual basis?

A. No, I should say that should be on cash basis.

Q. Now, you say that you have examined all of the records in evidence here? A. Yes, sir.

Q. And you have heard all of the testimony of the witnesses thus far? A. Yes, sir, so far.

Q. And have you then prepared, from the records in evidence and the testimony of witnesses, a computation of income?

A. I have prepared two computations.

Q. What computations of income are those?

A. One computation was computation of net income on deposit and expenditure; the other being on the net worth method.

Q. On bank deposit and expenditure method, I believe you stated, or did you say deposit and expenditure method?

A. Deposit and expenditure.

Q. Will you tell us briefly what the deposit and expenditure method is in connection with computation of income, if any, during the year?

A. It is a reconstruction of the taxpayer's financial transactions, [247] either running through his

(Testimony of Forrest P. Calkins.)

bank account or cash money that is expended during the year. We first take the total bank deposits. We subtract from them any deposits that were not of an income nature; that is, loans made from private parties, and deposited in the bank account and that is placed in non-taxable income. We add to that known cash expenditures that would not be reflected properly in the bank deposits. That would give us the gross income. From that we would subtract deductible expenses made during the period of the year, such as analysis of deposits account or cancelled checks, depreciation, his business expenses, personal expenses, although we would keep the business and personal expenditures separate. We would take the cash outlay expenses, or the checks written and paid and to that we would add what we refer to as known cash item expense, such as depreciation. We would have adjusted gross income, which in simplest form is the taxpayer's evidence of income. From that we would deduct the withdrawals of a more personal nature, as personal deduction, trips and payments on personal obligations, taxes paid, auto licenses, and taxable items of that nature, medical expenses as a personal deduction, to arrive at net income, or if those personal deductions do not total what the government allows as standard deductions, which is there computed on the tax table on the back of the tax returns for adjusted gross income of five thousand dollars or less was 10 per cent of your net income or adjusted gross income, limited to one thousand

(Testimony of Forrest P. Calkins.)

dollars, taking either the standard deductions [248] or items deduction, whichever is higher, we arrive at the net income for tax purposes.

Q. Now, if I understand you correctly, actually what you start in making computation of income by deposit and expenditure method, are the deposits to the bank account, is that correct?

A. Yes, sir, that is correct.

Q. And by adding all expenditures, or non-taxable receipts for expenditures, you arrive at a total of what would approximate that income. There are a few steps in between. Now you said you made a computation on another basis?

A. Net worth basis.

Q. I wonder if you could tell us what a net worth basis is, briefly?

A. Net worth basis is the reconstruction of income shown through an acquisition of assets over a given period of time for the taxable year. That is done by establishing a man's net worth; that is, assets he owns and the liabilities he owes on those assets. For example, you had a car and paid three thousand dollars and paid one thousand dollars, you have an equity of one thousand dollars. The net worth would show an automobile as an asset, carried at three thousand dollars, less the liability on the automobile of two thousand dollars; your net worth would be one thousand dollars. Say that is at the beginning of the period. If you acquire any other assets during the period, assuming the same automobile during the year you paid the two thousand

(Testimony of Forrest P. Calkins.)

dollars, the net worth computation of the assets at the end of [249] of the year would still list that automobile at three thousand dollars, would list no liability, would show his net worth at three thousand dollars, or increase of net worth of two thousand dollars. To that we would add net expenditures, personal expenditures, which were not reflected in that balance itself. In other words, a person, during the year, acquires a certain amount of money. The money usually goes one of two places, either spent or lost, paid for meals and utilities, or it goes to acquire assets. Now the money that is not reflected in the balance sheet, in arriving at net worth, which has increase in the balance sheet itself, in comparison with beginning, the ending balance sheet or ending picture, we add to that items which would not be reflected in that, which are usually personal expenses, living expenses, which would give us the same result for adjusted gross income figure. From that we would get the standard deductions or itemized deductions as liability.

Q. And you arrive at the net income?

A. Yes, sir.

Q. Mr. Calkins, the typewritten documents have just arrived in the courtroom. I wonder if you could explain what they are?

A. These are the computations I have just been discussing.

Q. Can you identify this typed document in a little bit better from than computations we have been discussing?

A. The typed page is my computation of net

(Testimony of Forrest P. Calkins.)

income based on bank deposits and expenditure method, covering the years 1948 and 1949. [250]

Q. What is the second page?

A. The second page is computation of net income based on net worth method, covering the years 1948 and 1949, showing balance sheets as of 1948, December 31, 1948, and December 31, 1949.

Q. And the balance of the pages?

A. They are supporting schedules that I have prepared.

Q. In other words, they are schedules explaining the items on your two front pages?

A. Yes, sir.

Q. Are those computations based on evidence in the records and the testimony of the witnesses?

A. Yes, sir, entirely.

Mr. Maxwell: I will offer the computations in evidence at this time.

The Court: There being no objection to the offer, it will be received in evidence as government's No. 34.

Mr. Maxwell: May it please the Court, counsel for the plaintiff and counsel for the defendant have agreed to stipulate that copies of this exhibit, which is numbered 34, may be passed to the Court and counsel and the jury, in order to follow the explanations to be given in the testimony of Mr. Calkins, and also the same stipulation will be entered into by the government at the time the defendant put on a witness for the same purpose, if he does. [251]

Mr. Puccinelli: That is so stipulated.

(Testimony of Forrest P. Calkins.)

The Court: Let the record show that it is stipulated that copies of the computations designated Government's Exhibit 34, may be delivered to members of the jury, for the purpose of following the testimony of the witness.

Mr. Maxwell: I think the copies should be returned at the close of the witness' testimony.

Mr. Puccinelli: I think that was the further stipulation.

The Court: The record will show the stipulation and understanding of counsel and the Court, that at the conclusion of the testimony the copies of computations handed to the jury for their assistance will be returned.

Mr. Maxwell: May I hand copies to the jury, your Honor?

The Court: Yes, you may.

Q. Mr. Calkins, referring to the first page of Exhibit 34 in evidence, and the second page, can you tell me whether these computations are made on the cash or accrual basis?

A. On the cash basis, with the exception of inventory item.

Q. Are they made on the same basis as the income tax returns, which I believe are still before you?

A. Yes, sir.

Q. They are made on the same basis as those returns? [252]

A. Yes, sir.

Q. Now I wonder if you would explain page No. 1 of this exhibit. You have the original exhibit now, do you?

A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. Would you explain what you did in making those computations?

A. In making this computation, I first added all of the cash deposits, plus cash which was found listed on deposit tickets as such cash item; that is, you would often find occasion where a person needs cash, they will deposit checks for so much money, less so much cash, and then deposit to the bank and that is considered as deposit. The cash that is accounted for here in line 1(b), cash not deposited actually stated, is less than those deposit tickets on the First State Bank of Rangely, showing he entered total amount on the deposit ticket, the cash taken out was less the cash item referred to on the deposit ticket and in the amount of actual deposit never did.

Q. May I understand that. If every one will turn to page 3 of this computation, and would you make your explanation with respect to the first item there on that page?

A. Yes, sir. On January 2, 1948, the deposit ticket reflected total deposits, total amount to be deposited, \$1,283.57. Less cash item of \$283.57, leaving net deposit, actually deposited in the bank account, credited to the taxpayer's ledger, was one thousand dollars.

Q. I show you typed deposit slip on Exhibit 7 in evidence, and ask you if that is the deposit slip to which you are referring? [253]

A. Yes, sir, it is. I might add on these deposit

(Testimony of Forrest P. Calkins.)

slips it does not actually show less cash. It shows the initials "LC."

Q. Does that deposit show down at the bottom of the ticket? A. Yes, sir.

Mr. Maxwell: I ask permission of the Court to exhibit this deposit ticket before the jury.

The Court: You may.

Q. Now you have totalled on page 3 of this exhibit what amounts?

A. I have totalled the total amount on the deposit ticket, the cash withdrawn, or cash taken by him and the net deposits. Among these particular checks or these particular deposit tickets, this does not include all the deposits for the years 1948 or 1949. This is merely a summary of those deposit tickets on which there is a record of cash going back to the taxpayer and was not left at the bank on deposit.

Q. You have done the same thing for the year 1949? A. Yes, sir, I have.

Q. As to the First State Bank of Rangely?

A. Yes, sir.

Q. That was the Ace High account only?

A. Yes, sir.

Q. Did you do the same thing on the Nevada account? A. Yes, sir, I did.

Q. Were there any such items reflected in the deposit slips?

A. In the year 1948 I found none. In the year 1949, as I recall, [254] there were possibly one or two small items. Those, I might explain, would

(Testimony of Forrest P. Calkins.)

make no net difference. In other words, we are merely at this time trying to account for all of the monies received. If you will look on line 5(f), I have also deducted the same amount that was added in on line (b).

Q. Why did you do that?

A. We had no way of tracing this cash. We did not know for what purpose it was used, whether for personal or business expenditure. I recall nothing in the evidence, in the form of testimony or documents, that indicated it was used for personal expenditure or business, so it was all treated as a business expense.

Q. You allowed it as a business expense?

A. Yes, sir, I did.

Q. Now will you explain from what you took your figures on line 1(a) on the first page?

A. Line 1(a) I totalled both the bank deposit slips and deposits as per the ledger sheet for the years 1948 and 1949. I might say there is one deposit slip missing.

Q. Those are Exhibits 15, 9, 8 and 7 in evidence?

A. Yes, sir, they are.

Q. Now would you explain 1(c)?

A. 1(c) is total of all deposits made to the Nevada Bank of Commerce in the years 1948 and 1949. I totalled both the deposit tickets and the deposits as reflected on the ledger sheets [255] themselves.

Q. And then you arrived at what total?

A. \$128,444.28 for the year 1948; \$21,816.54 for the year 1949.

(Testimony of Forrest P. Calkins.)

Q. Now that represents what concept? I mean, what would you call that total?

A. That total is all the cash or monies received as reflected on the bank records.

Q. Now were there any expenditures not reflected on the bank records?

A. Yes, sir, I found certain cash expenditures which were not reflected on the bank records.

Q. That you have included in?

A. Line 2 also——

Q. Line 2 shows what figures?

A. A total for each year, \$8,250 for 1948; \$7,-299.55 for 1949.

Q. What have you done with those amounts?

A. I have added those to the cash that is reflected through the records of the bank accounts.

Q. And then what total did you arrive at?

A. \$136,694.28 for the year 1948; \$29,116.09 for the year 1949.

Q. What sort of total would that figure; what does the concept of those totals represent?

A. That would represent all the monies known he has received or handled by the taxpayer during the years 1948 and 1949.

Q. As shown by the testimony or exhibits?

A. Yes, sir. [256]

Q. Now let us go back to line 2, cash expenditures on net income record, schedules I and J. Perhaps you can tell us how you reach those figures. Start with Schedule I.

(Testimony of Forrest P. Calkins.)

A. Schedule I is a list of cash expenditures for the year 1948, which I could not trace back through the bank accounts of the taxpayer or through his personal records.

Q. In other words, you did not find them listed in the bank register?

A. No, sir, I did not.

Q. Or in the records themselves?

A. No, sir.

Q. Of what do those items consist?

A. Payments on notes; two payments on the Joe Rosa note, August 24, 1948, for \$2,250, payment on the Joe Rosa note on December 23, 1948, in the amount of \$1,500. Payment on loan from Bacon on August 30, 1948, in amount of one thousand dollars, followed by a listing of four payments to the City of Rangely, donation items, one on August 12, 1948, in amount of \$200, one October 25, 1948, in amount of \$100; on November 23, 1948, in amount of \$100; on December 28, 1948, in amount of \$100. I added the living expenses, estimated at three thousand dollars, giving the total cash expenditure unaccounted for on any records of the taxpayer in the amount of \$8,250 for the year 1948.

Q. Can you tell us where you arrived at your information as to payments on the Joe Rosa [257] note?

A. From the loan record.

Q. That is here?

A. Yes, sir.

Q. How about the payment on the loan from Mr. Bacon?

A. From the Conclusions of Law and Findings of Fact.

(Testimony of Forrest P. Calkins.)

Q. That is here in evidence also?

A. Yes, sir.

Q. How about the information as to the City of Rangely?

A. The City of Rangley I received the dates and amounts from the schedule left by the witness from the City of Rangely.

Q. And the living expenses, where did you get them?

A. From Special Agent Bell's testimony. He testified that Mr. Percifield estimated living expenses at three thousand dollars per year.

Q. Now let us turn to these assets on this computation, and I will ask you to explain the items that you have in line 3.

A. In line 3 I reviewed the total amount of cash accounted for as having been received and handled by the taxpayer for the year by the items which are not of a taxable nature; that is, loan from the Nevada Bank of Commerce, loan from Clifford White, Cora Craft, from W. D. Fortner, payment on the purchase of car to Blake Craft.

Q. You have added all these items together?

A. Yes, sir.

Q. And the total is what?

A. \$15,300. [258]

Q. And what did you do with that \$15,300?

A. I subtracted that from \$136,000 to arrive at a gross income figure. That is, we took out non-taxable deposits.

Q. In other words, these are non-taxable receipts?

A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. And you took those out of any computation of income? A. Yes, sir.

Q. Now what figure of gross income did you arrive at?

A. For the year 1948, \$121,394.28; for the year 1949, \$29,116.09.

Q. Now would you explain the title of line 5?

A. Title line 5, "Less Liability Deduction Cash Outlay." That is deduction which the taxpayer is entitled to which were paid in cash.

Q. As you come upon each item, tell us where the information came from.

A. The information from 55(a), interest, was acquired at the Mr. White testified in the year 1949 he received \$75 interest. Line 5(b), interest paid to Joe Rosa, I prepared a schedule on that schedule (b) on the 4th page. Computation of interest on that for the years 1948 and 1949, I took the net balance as of January 1, 1948, and subtracted from that the net balance on December 31, 1948, giving an amount to apply to principal of \$23.047.47. I totalled the payments made on that note during the year 1948. They totalled \$24,765, and subtracted from that amounts applied to principal of \$23,047.47 and found the balance [259] liability as interest on that obligation paid during the year 1948. 1949 I went through the same procedure, starting with a balance due at the beginning of 1949, subtracting from that the balance due at the end of 1949, giving the amount applied to the principal, total payments for the year 1949, subtracted from

(Testimony of Forrest P. Calkins.)

that what applied to principal and the balance was liability as interest deduction.

Q. Turning then to the first page, I think you were about to approach line 5(c).

A. 5(c), interest paid W. D. Fortner. I found a check in Exhibit 30, check register, payment to W. D. Fortner in amount of \$1,044. Mr. Fortner wasn't certain, as I recall his testimony, the amount of loan. Apparently there was another loan, other than the two thousand dollars, for which he has a note in evidence. I assumed that payment of \$1,044 represented payment on the principal loan of one thousand dollars, leaving \$44 interest thereon.

Mr. Maxwell: May we have the computations returned at this time?

The Court: Yes, according to the stipulation, the baliff will collect the computations.

(Jury admonished and noon recess taken until 1:30 p.m.) [260]

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

Mr. Calkins resumed the witness stand on further:

Direct Examination

By Mr. Maxwell:

May the record show that I am delivering again to the jury copies of the computation, Exhibit No. 34.

Q. Mr. Calkins, I believe we were discussing item 5 on the first page, which is computation of net income bank deposit expenditure method, Ex-

(Testimony of Forrest P. Calkins.)

hibit 34. You had discussed liability deductions, cash outlay, interest paid to Clifford White, interest paid to Joe Rosa, and I believe you were discussing the amount of \$44 interest paid to W. D. Fortner at the close of the morning session. Had you finished your explanation of that?

A. Yes, I had.

Q. Now item (d), will you explain what that is?

A. That is interest paid to the Nevada Bank of Commerce on loan made by the taxpayer, Mr. Percifield for the year 1949, in amount of \$78.84, and amount of \$27.33 interest paid for the year 1949.

Q. Where did that information come from?

A. It came from the liability ledger sheets presented by the Nevada Bank of Commerce.

Q. All right; will you explain the next item?

A. The next item? [261]

Q. That is No. 5(e)?

A. 5(e) yes. That is broken down into two parts; that is, bank withdrawals from the First State Bank of Rangely, computations made on that is Schedules E and F; second, is Nevada Bank of Commerce. Schedule on that computation is from Schedule G.

Q. Now will you explain what you did on those schedules and how you reached the amounts that Mr. Percifield paid.

A. Schedule E, which is computation of deductible withdrawals for the year 1948, money withdrawal from the First State Bank.

Q. Just a minute—what is a computation of deductible withdrawals? I mean, what are you trying to reach?

(Testimony of Forrest P. Calkins.)

A. I am showing the method used in arriving at liability deductions.

Q. All right.

A. I start with a bank balance reflected on bank ledger sheet as of December 31, 1947, in amount of \$2,247.74. I adjusted that to show the taxpayer's bank balance on that by subtracting from that checks which had not at that time been received by the bank and charged against his account.

Q. 12-31-47?

A. Yes. Those were checks issued in the year 1947. Those checks totalled \$587.62, giving an adjusted balance of \$1,660.12.

Q. That is what he actually had in the bank, so to speak?

A. That is money actually his own, yes, sir. I added to that adjusted bank balance total deposits as shown on the bank ledger [262] sheets and on the deposit tickets of \$99,359.39, arriving at the total funds available; that is, balance at the end of the year, plus money put in, or all money available for him to withdraw, arriving at \$101,019.51. From that I subtract bank balance as shown on the ledger sheet as of the end of the year, of December 31, 1948, \$1,823.64. I subtracted from that checks which had been issued in the year 1948, but did not clear the bank as of the end of the year, making the same adjustment for outstanding checks as I discussed before, giving adjusted bank balance of \$1,729.70. Subtracting that from total funds availa-

(Testimony of Forrest P. Calkins.)

ble, I arrive at total withdrawals from bank account.

Q. In other words, in this computation you take the money he put in the bank account and add to it the balance he had at the beginning of the year and those two factors, what he had or he put in the bank, that you took away from what he had in the bank at the end of the year, that amount or money was all his withdrawals?

A. That is right. That amounted to \$99,287.72, and I subtracted from those withdrawals items which were shown on government's Exhibit 30.

Q. Which is the check disbursements?

A. Check disbursements, check register of the taxpayer, as being monies expended for other than business expenditures, that is, for the operation of the business itself. Those payments were payments on loan to Joe Rosa, payments on loan to William Bacon, payments on loan to W. D. Fortner, payment on loan to [263] the Nevada Bank of Commerce, and one item marked personal, which the bookkeeper testified that she so understood those were personal expenditure.

Q. That was how much?

A. \$150.00. Total, \$28,734. Those withdrawals I subtracted from total withdrawals and arrived at deductible withdrawals of \$70,555.72.

Q. Except for these items, called payments on loans—4 payments—and personal expenses, do I take it you have allowed every check on the First State Bank of Rangely as a deductible business

(Testimony of Forrest P. Calkins.)

expense in your computation? A. Yes, I did.

Q. All right, and that was for the year 1948?

A. 1948, yes, sir. The year 1949, Schedule F——

Q. That is the next page?

A. Yes, sir. I made similar computations, only pertaining to figures for the year 1949.

Q. And what did you find the non-deductible withdrawals were for that year?

A. Non-deductible withdrawals for that year were payments on the Joe Rosa loan of nine thousand dollars.

Q. And what was then the balance of withdrawals that you allowed? A. \$11,779.81.

Q. That is the same situation that obtained in the prior years, you have allowed every check drawn on the bank account as business [264] expense, with the exception of payment on the Joe Rosa loan? A. Yes, sir.

Q. Now what is G on the following page?

A. I made only one adjustment there for non-deductible items, and that was purchase of automobile for taxpayer's brother-in-law, Blake Craft, \$2,733.60.

Q. In other words, you took that purchase of automobile out of income because he had been reimbursed for that? A. Yes, sir.

Q. Did you allow then, with the exception of the withdrawal for that automobile, all of the checks against the Nevada Bank of Commerce as business expense?

(Testimony of Forrest P. Calkins.)

A. Yes, I did. The year 1949 I made no adjustment for withdrawals.

Q. You made no reductions in the amount of the amount of withdrawals, did you say?

A. That's right.

Q. You allowed all of the checks on the Nevada Bank of Commerce for the year 1949 as a business expense?

A. All the withdrawals, yes sir.

Q. So now can you return to the first page and read the amounts that you have allowed as business expense on bank withdrawals under item (5(e).

A. Item 5(e) (1), First State Bank of Rangely, year 1948, \$70,555.72; year 1949, \$11,779.81. Line 5(e) (2), Neavada Bank [265] of Commerce, liability withdrawals, \$19,205.50 for the year 1948; for the year 1949, \$700.71.

Q. Now will you go to item 5'f), explain that.

A. 5(f), I believe I explained before when I was explaining line 1(b). That is the cash withheld on deposits, less cash item I referred to.

Q. In other words, that cash that he did not deposit, but listed on the deposit slips?

A. Yes, sir.

Q. You allowed all of that amount as a business expense, do I understand that?

A. Yes, sir, we have no evidence to the contrary.

Q. Now will you explain item (g)?

A. Item (g), known cash outlay expense.

Q. Can you tell us what you mean by known cash outlay expenses?

(Testimony of Forrest P. Calkins.)

A. Those are expenses the taxpayer is entitled to, for which he did not actually expend the money.

Q. You say he is entitled to, under what?

A. Under the Internal Revenue Code.

Q. He can depreciate in computing income tax?

A. Yes, sir, in this case it is in computing his business income.

Q. What are those items?

A. G(1) gives decrease in inventory as from Schedule K——

Q. All right, let us go to Schedule K and find out how you computed that?

A. By referring to the return as filed from the Nevada Club and [266] Ace High for the year 1948, they show an inventory on hand as of December 31, 1947, Nevada Club \$1,200; Ace High \$1,200. The taxpayer actually had \$2,400 inventory on hand at the beginning of the period. The income tax return showed inventory as of December 31, 1948, Nevada Club, of \$750 and Ace High Club \$1,275, or a total of \$2,025.

Q. So what that means is he had an inventory at the beginning of the year \$2,400 and at the end \$2,025?

A. Well, it means that he sold \$375 worth of inventory more than he purchased during the year 1948.

Q. He is entitled to deduct that?

A. Yes, sir. It did not appear on the cash items he has on hand in the beginning of the year.

Q. And you have allowed that as a credit to

(Testimony of Forrest P. Calkins.)

income? A. Yes, sir, I have.

Q. Let us go to line G-2 on this front page again.

A. Line G-2 is depreciation from the Ace High Club and Nevada Club, as shown on the income tax returns as filed for the years 1948 and 1949.

Q. Well, then, what result did you reach in line 5(b)?

A. Line 5(b) is total deductions to arrive at adjusted gross income.

Q. In other words, those are total deductions which you were notified the taxpayer was entitled to each of the years 1948 and 1949?

A. Yes, sir. [267]

Q. How much?

A. \$106,278.74 for the year 1948; \$20,254.72 for the year 1949.

Q. And so you have reached the amount of adjusted gross income in line 6 by doing what?

A. By subtracting the liability deductions from gross income figure of \$121,394.28 for the year 1948.

Q. That is on line 4?

A. Line 4, yes, sir.

Q. You subtract line 5(b) from line 4?

A. Yes.

Q. And what result did you reach there?

A. I reached the adjusted gross income for the year 1948, line 6, \$15,095.54; year 1949, \$8,861.37.

Q. And in line 7 what did you do?

A. I subtracted, or allowed, standard deduction. For the year 1948 taxpayer's adjusted gross income

(Testimony of Forrest P. Calkins.)

was in excess of ten thousand dollars, ten per cent one thousand dollars, allowing standard deduction allowed in the maximum of one thousand dollars. For the year 1949, adjusted gross income was \$8,-861.37, allowed ten per cent of that as standard deduction, in amount of \$886.14, to arrive at net income as shown on line 8.

Q. In line 5 you allowed certain liability deductions and line 7 you are allowing another deduction, how does that happen? There is quite a difference between those two items.

A. The law allows certain deduction expenses not incurred in your trade or business. To put it simply, I might say in arriving [268] at the adjusted gross income, the taxpayer is entitled to deduct non-business expenses, the deductions allowable by law, in arriving at net income are more of a personal nature of the taxpayer.

Q. Will you name some of those?

A. Contributions, interest, taxes paid on behalf of the individual, personal taxes, losses from fire or theft, medical deductions, which have restrictions, and miscellaneous deductions.

Q. You have allowed a standard deduction, in lieu of those items?

A. Yes, I have.

Q. Why is that?

A. The only reason I can give is the generosity of the government. No, I won't say that. I think it has been found that the average taxpayer does not have more than ten per cent of his income used

(Testimony of Forrest P. Calkins.)

in deductible expenditures and there would be a thousand dollar limitation.

Q. In the records here did you find ten per cent of the adjusted gross income was more than the specific deductions, such as you have named?

A. No, sir, I did not.

Q. So you did not allow the maximum there of the standard deductions? A. No, sir.

Q. Then you subtracted the standard deduction from the gross income? [279] A. Yes, sir.

Q. And what did you reach?

A. The net income.

Q. That is line 8? A. Yes, sir.

Q. What is that amount?

A. For the year 1948, \$14,095.54; for the year 1949, \$7,975.23.

Q. And then line 9 what did you do?

A. Line 9 I scheduled the net income as shown by the returns filed by the taxpayer.

Q. And that was what?

A. For the year 1948 I had to add the total for the two returns filed, arriving at a net loss of \$7,087.03. The year 1949 return showed a net loss of \$3,923.07.

Q. Then what figure did you arrive at in line 10?

A. Line 10 shows understatement of income.

Q. Understatement of income on the return?

A. Yes, sir.

Q. That was how much?

A. For the year 1948, \$21,182.57; for the year 1949, \$11,898.30.

(Testimony of Forrest P. Calkins.)

Q. Before you turn the page, we have gone down and explained this first page item by item, is that correct? A. Yes, sir. [270]

Q. Can you give me a very brief summary of exactly what you did, in general?

A. In general I took all the cash received by the taxpayer, added to that—that is, all the cash of which there was a record—added to that expenditures paid with cash. I subtracted from that figure all monies received from sources other than taxable sources. I subtracted from that liability deductions, business deductions of the taxpayer incurred for the year 1948 and 1949. From that I subtracted the standard deductions, arriving at the net income figure for 1948 and 1949.

Q. Now on page 2, can you tell me generally what page 2 of Exhibit 34 is?

A. Page 2 is another method of computing the taxpayer's net income. That is the net worth.

Q. Now that is completely different from the bank deposit method, is it?

A. It is a different computation, yes, sir.

Q. And as a matter of fact, it takes different items and evidence into consideration, does it?

A. Yes, it does. The main difference between the two, deposit and expenditure method is based on activities during the period, whereas your net worth method is based, basicly and primarily, on fixed period of time. It is one fixed time, set time, as against another fixed time.

(Testimony of Forrest P. Calkins.)

Q. Will you say generally what you have done on this page 2?

A. Page 2 I listed all the assets that are in evidence here; [271] I listed all his liabilities; I listed both the assets and liabilities as of January 1, 1948, December 31, 1948, and December 31, 1947. I subtracted the total liabilities from the total assets to arrive at the taxpayer's net worth of his investments in assets.

Q. Is that a cost basis?

A. On the cost basis.

Q. So that considered only what he paid for it?

A. Yes.

Q. It doesn't consider how much it may have increased or decreased in value? A. No.

Q. Is his increase or decrease in value taxable?

A. No, it is not.

Q. When you arrive at net worth figure at 1-1-48, December 31, 1948, December 31, 1949, then what do you do?

A. I subtracted my opening net worth, or net worth at the beginning of the period, from net worth at the end of the period. That shows the increase during the period.

Q. That shows how much more, if there is more, he had at the end of the year than he had at the beginning? A. Yes, sir.

Q. Then what did you do, generally?

A. I made certain adjustments to that. I reduced this increase in net worth by the proceeds

(Testimony of Forrest P. Calkins.)

from sale of cattle, which I believe Mr. [272] Fortner——

Q. I would rather have what you did generally and then go down and tell us a little more in detail.

A. Generally I made certain adjustments, which do not reflect in the assets or liability section of this net worth statement.

Q. And you arrived at a figure for that income, did you? A. Yes, I did.

Q. At the top of the schedule for assets, will you tell us what you included in assets for net worth?

A. In assets for net worth I included cash on hand, as testified to by Mr. Bell, bank account balances.

Q. How much was cash on hand?

A. Cash on hand, five thousand. The bank balances for the First State Bank of Rangely for the period January 1, 1948, 12-31-48, December 31, 1949, Nevada Bank of Commerce listed balance as of January 1, 1948, December 31, 1948, and account had been closed out during the year 1949 as of the end of '49; in other words, the basic two accounts listed separately for January 1, 1948, balance as of December 31, 1948, and balance as of December 31, 1949, on both accounts. I then listed inventories in the Nevada Club and Ace High Club for dates January 1, 1948, December 31, 1948, and December 31, 1949.

Q. Now I see you have that figure given here on inventory at the end of 1949? A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. Can you explain where you got your inventory figures in all three of these columns? [273]

A. The inventory figure as of January 1, 1948, for the Nevada and Ace High Clubs was shown on the income tax returns. The inventory as of December 31, 1948, was also shown on the income tax returns. The inventory for December 31, 1949, I took from statement made by Mr. James Bell in his testimony as to what the taxpayer told him the inventory was substantially the same both years.

Q. Now let us go to item (d).

A. Item (d), frame building in Nevada. I took the figure from the income tax returns as filed. 1947 return showed that as of January 1, 1948; 1948 return showed it as of December 31, 1948, 1949 showed asset as of December 31, 1949.

Q. And the next item?

A. (e), equipment Nevada Club, 1947 return——

Q. You are referring to 1948 return. Take 1948 and 1949, 1947 return is not in evidence. And then the next is the Ace High Club, line 1.

A. Line 1 is the Nevada Club. Those figures were taken from the '48-'49 return.

Q. And next one, the Ace High Club?

A. The Ace High Club was computed on the testimony of Mr. Rosa, the fact that he sold the club in '45 for \$70,000, and the inventory was valued at \$3,500, giving a value to the Ace High of \$66,500.

Q. The next item is the Ace High Club.

A. Gambling equipment purchased by the tax-

(Testimony of Forrest P. Calkins.)

payer in the year 1949. I think Mr. Stroud so testified. [274]

Q. I believe his documents are in evidence here?

A. Yes, sir.

Q. Household furniture?

A. Household furniture was based on testimony of Special Agent Bell when he stated that the taxpayer told him he had household furniture of about \$500 throughout the period.

Q. The Chevrolet?

A. Was taken from the testimony of Mr. Bell, in similar manner, he testified the taxpayer told him he had a Chevrolet worth approximately \$150 throughout the period.

Q. And automobile?

A. The automobile—we have two automobiles involved. The one listed as of January 1, 1948, and December 31, 1948, was taken from testimony of Special Agent Bell. In regard to the 1946 Buick, the taxpayer estimated that value at \$2,400. December 31, 1949, reflects the total cost price to the taxpayer of the 1949 Buick.

Q. And what was that based on?

A. That was based on the testimony and documents presented by the bookkeeper of the sales organization.

Q. And you totalled the assets, did you?

A. Yes, sir, I did; item L, total assets.

Q. What were those totals as of each date?

A. As of January 1, 1948, total assets, \$88,-617.81; as of December 31, 1948, total assets, \$88,-

(Testimony of Forrest P. Calkins.)

992.24; as of December 31, 1949, total assets, \$88,570.71. [275]

Q. The assets did not increase very much, did they?

A. No, sir, they did not. In fact, they decreased.

Q. Now the liabilities.

A. Liabilities (2) I listed the loans and notes payable as set out in the evidence in the case.

Q. And will you state what those were?

A. Joe Rosa note, one to which he testified, I think there was a Mrs. Rosa also testified about note payments.

Q. And where did these figures come from in your three columns?

A. These figures came from record of payments.

Q. And the first figure is that amount owing to Mr. Rosa, or the amount paid?

A. The amount owing.

Q. That is how much as of January 1, 1948?

A. As of January 1, 1948, amounts to \$49,500.

Q. And as of December 31, 1948?

A. \$27,452.53.

Q. That is a decrease of some 22 thousand?

A. Yes, sir. On December 31, 1949, it showed on that note \$20,559.73.

Q. Now the next item?

A. Was William Bacon note.

Q. And he owed?

A. He owned, as of January 1, 1948, \$6,500. He owed one thousand dollars as of December 1, 1948,

(Testimony of Forrest P. Calkins.)

and one thousand dollars as of December [276] 31, 1949.

Q. And the Jackson?

A. Jackson loan was \$4,000 due as of January 1, 1948; \$7,500 due as of December 31, 1948, and \$5,500 due December 31, 1949.

Q. And Mr. Fortner?

A. Mr. Fortner, at the beginning of the year, January 1, 1948, he owed Mr. Fortner \$2,000. End of 1948, December 31, he owed \$1,700, and December 31, 1949, \$1,140.

Q. Now the next item.

A. Next item, the Nevada Bank of Commerce. Balance due them as of January 1, 1948, \$2,000. As of December 31, 1948, \$1,000. That note was paid off in the year 1949, with no balance due the said bank December 31, 1949.

Q. And the next?

A. Clifford White. He owned note liability to Clifford White as of January 1, 1948. As of December 31, 1948, the taxpayer owed him a balance of \$2,500. The year 1949 no payments were made; as of 12-31-49, \$2,500.

Q. The next item?

A. Cora Craft. The taxpayer borrowed in 1948, \$3,500. Balance due at the end of 1948, 12-31-48, was \$3,500. No payment was made on that note in 1949, leaving balance on it of December 31, 1949, of \$3,500.

Q. Item 8 is chattel mortgage G. M. A. C.?

A. Yes, sir, there was a balance due on the

(Testimony of Forrest P. Calkins.)

automobile purchased by the taxpayer for the year 1949 in amount \$2,249.47, as of December [277] 31, 1949.

Q. And then you arrived, after adding all those up at a total figure liabilities at each one of these periods? A. Yes, sir, on those given dates.

Q. What was the amount of liabilities which you arrived at?

A. Total liabilities on January 1, 1948, \$64,000; on December 31, 1948, total liabilities, \$44,652.53; on December 31, 1949, total liabilities were \$36,449.20.

Q. Did the amount of monies Mr. Percifield owed go up or down? A. It went down.

Q. In other words, he didn't own as much at the end of 1949 as he did at the beginning of 1948?

A. No, sir, he did not.

Q. How did you arrive at the figure you have here for net worth?

A. I arrived at that figure by subtracting total liabilities on each given date from the total assets on that same date.

Q. And how much did you arrive at then January 1, 1948?

A. January 1, 1948, I determined the taxpayer's net worth to be \$25,617.81.

Q. And how much was his net worth at the end of that year, 1948? A. \$34,339.71.

Q. That is an increase of some \$18,000?

A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. And what was his net worth then at the end of the next year, 1949?

A. End of 1949 the taxpayer's net worth was \$52,122.51.

Q. And that was an increase of some [278] \$7,000? A. Yes, sir.

Q. How did you compute those figures, from year to year, beginning year to year?

A. You subtract the net worth beginning of the period from the net worth at the end of the period.

Q. And you arrived at the increase?

A. At the increase, yes, sir.

Q. Did you figure out on line B the exact amount of increase for 1948?

A. Yes, sir, I did. Increase for 1948, \$18,721.90; increase net worth 1949, \$7,781.80.

Q. After you had found those figures for net worth for each of the years, 1948 and 1949, then what did you do?

A. I subtracted from them items which are not reflected in the net worth statement and also added non-deductible expenses which could be reflected in the net worth statement.

Q. In other words, you subtracted certain items, did you?

A. I added some items and subtracted some items, yes, sir.

Q. Let us go to the items you subtracted. (C) What was the first item subtracted?

A. Proceeds from cattle sales that Mr. Fortner

(Testimony of Forrest P. Calkins.)

made for the taxpayer and retained as against the liability.

Q. Why did you subtract that?

A. That shows adjusting—he had no asset for the cattle. We have no reflection of the cattle bill because Mr. Fortner already testified he did not know the true cost of the cattle. [279]

Q. So, because he didn't know the true cost of the cattle, you didn't include it in the net worth asset?

A. No, sir. We did not do a computation as to any profit or loss on this.

Q. In other words, you eliminated the proceeds from the sale from the net worth increase?

A. Yes, sir.

Q. So it wouldn't be reflected on any net worth figures? A. That is right.

Q. Then what else did you subtract there?

A. Subtracted depreciation liability, as set forth on the Ace High Club in returns for the Ace High Club and Nevada Club, and as you will notice up in the assets section, lines D, E, F and G, the assets remain constant as to cost; that is, the cost price remains constant. Therefore, by carrying the net cost, it did not reflect either increase or decrease, so to allow the taxpayer depreciation, we have to make an adjustment.

Q. That depreciation does not represent any money expended by the taxpayer?

A. No, sir.

Q. But it is amounts allowable to him by law?

(Testimony of Forrest P. Calkins.)

A. Yes, sir.

Q. And you have subtracted that from the increase of net worth as well? A. Yes, sir.

Q. And by subtracting these items from increase of net worth what figure do you get? [280]

A. The total assets subtracted for the year 1948 was \$6,219.12, leaving \$12,502.98 for the year 1948. For the year 1949 these items totalled \$5,293.95, leaving net increase in net worth \$2,487.85.

Q. Now, then you added certain amounts; is that right? A. Yes, sir.

Q. And these deductible expenses?

A. Yes.

Q. Why did you add these amounts to the net worth figure you read here?

A. They again are not reflected in the assets or liabilities on this net worth statement.

Q. What were those items?

A. One item was living expenses; \$3,000 for the year 1948 and \$3,000 for the year 1949.

Q. What is this item 2, loss on trade-in on Buick, Schedule L?

A. That is loss sustained by the taxpayer on trade-in of 1946 Buick.

Q. Turn to Schedule L and I will ask you to explain that to us.

A. Schedule L shows computation loss on trade-in of 1946 Buick. Using the cost basis testified to by Special Agent Black, as being told him by the taxpayer, \$2,400, subtract from that trade-in al-

(Testimony of Forrest P. Calkins.)

lowance for purchase of 1949 Buick, \$609.80. Taxpayer sustained a loss of \$1,790.20.

Q. Is loss on trade-in of a personal automobile deductible?

A. Not on a personal automobile; no. [281]

Q. Then what figure did you arrive at in item III, line E?

A. III E, adjusted gross income for 1948, \$15,502.78; for the year 1949, \$7,278.05.

Q. And from that you took away the standard deductions as you explained previously?

A. Yes, sir.

Q. And what net income then did you reach by the net worth method?

A. By the net worth method, I arrived at a net income for 1948 of \$14,502.78; for 1949, \$6,550.24.

Q. And the net income, did you compare with the net income on the return? A. Yes; I did.

Q. And that was a \$7,000 loss and \$3,900 loss?

A. Yes, sir; for the years 1948 and 1949.

Q. What was the understatement then of that income on those returns for the years 1948 and 1949?

A. For 1948, understatement on the return was \$21,589.81. For the year 1949, \$10,473.31.

Q. Now, that is the computation on the net worth method; is that right? A. Yes, sir.

Q. Now, will you very briefly tell me what you did in doing the net worth method again?

A. I start at the net worth beginning of the period 1948 to the end of the period 1948—to the end of the year 1949. [282] To do that I totalled all the

(Testimony of Forrest P. Calkins.)

taxpayer's assets, all his liabilities, subtracted the total liabilities from the total assets and arrived at the net worth figure. I subtracted the beginning net worth figure from the ending net worth figure to arrive at the increase in net worth. I made certain adjustments, deducting items that did not reflect in the net worth statement. I allowed depreciation, which was not reflected in the net worth statement. I added back living expenses and non-deductible losses, to arrive at adjusted gross income. I subtracted from that the standard deductions allowed by law and arrived at the net worth.

Q. I notice net income by bank deposit method is a little bit different than net income by net worth method. Now, can you explain why there is a difference, if there is a feasible explanation, and I think there is.

A. The net worth reflects basically asset, ownership in assets, and expenditures dealing with the flow of money, which is harder to pinpoint.

O. And the result is approximately the same, but slightly different?

A. If we have all the figures from the transactions during the year complete, the net worth, we should come out fairly close; yes, sir.

Q. In either of these methods, in computing either one, computing income by either method, the bank deposit method or the net worth method, do you know of any item, here in evidence, or in [283] the testimony, which could possibly be allowed Mr. Percifield, on the basis he prepared his return, kept

(Testimony of Forrest P. Calkins.)

his books, cash records, and cash receipts, that has not been allowed?

A. No; I can't remember any.

Q. You tried to include every one of those he was entitled to? A. Yes, sir.

Q. Now, Mr. Calkins, I am going to hand you another piece of paper here and see if you can tell me what it is.

A. Attached sheet is computation of tax based on net income assets, computed on deposit and expenditure method for the year 1948.

Q. And what are the other sheets?

A. The other sheets, page 2 is computation of tax based on net income on deposit and expenditure method covering the year 1949. Page 3 is computation of tax based on net worth method arriving at net income for the year 1948; and page 4 is computation of tax arriving at net income on the net worth method for the year 1949.

Q. Did you prepare these computations?

A. Yes, sir; I did.

Q. Are they based upon the figures you have computed as income in Exhibit 34?

A. Yes, sir; they are.

Mr. Maxwell: I will offer this as government's Exhibit 35 in evidence.

Mr. Puccinelli: There will be no objection. [284]

The Court: The offer on the part of the government will be received in evidence as government's Exhibit 35.

Mr. Maxwell: May the record show that the same

(Testimony of Forrest P. Calkins.)

stipulation as to Exhibit 34 pertains to Exhibit 35? I would like to pass copies to the jury.

Mr. Puccinelli: It has been so stipulated.

The Court: Very well, the record will show the stipulation.

Mr. Maxwell: May the record show that I now pass copies of Exhibit 35 to the jury.

A. Now, Mr. Calkins, I take it Exhibit 34 represents your computation of income tax due on amount shown in Exhibit 34 as net income of the defendant, Raymond Percifield? A. Yes, sir; that is right.

Q. So, will you take this first sheet here, and explain what it is?

A. Page 1 is computation of tax based on deposit and expenditure method. Line 1, net income——

Q. For what year?

A. Year 1948, and to get net income as shown on the computation of deposit and expenditure method, 1948, \$14,095.54; subtract from that, liabilities, personal exemptions for the taxpayer, five dependents at \$600, which was a total of \$3,000, leaving net income subject to tax, \$11,095.54. In 1948, the law provided that a taxpayer filing a joint return, husband [285] and wife, may have the same benefit as those filing separate returns for community property, referred to as split income division, each takes one-half. I divided the tax on the income subject to tax by two to arrive at the net income subject to tax, \$5,547.77. I computed the community tax on that figure in amount \$1242.42.

(Testimony of Forrest P. Calkins.)

Q. What did you use to do that?

A. I used the surtax schedule to determine that; that is, the graduated table. I arrived there at \$1242.42, subtracted from that, credits allowable by law on the first \$400, 17 per cent or \$68.00; credit on \$842.42 at 12 per cent or \$101.09; total credit allowable, \$169.09. Subtract that from the tentative tax to arrive at one-half of the regular tax, which was \$1,073.33. Corrected tax was computed by two, line just above that, or one-half of corrected tax, resulting in corrected tax of \$2,146.66. From that I subtracted the income tax per return, which was zero per return, understatement per return, \$2,146.66

Q. Now, on page 2, what did you do?

A. Computed tax on income as computed on the deposit and expenditure method for the year 1949.

Q. The computation is substantially the same form as for the year 1948? A. Yes, sir; it is.

Q. How much tax did you arrive at due for the year 1949 from the bank and expenditure method?

A. \$852.82. [286]

Q. And what was the tax on the return?

A. Zero.

Q. And understatement of tax would be the same, \$852.82? A. Yes; it would.

Q. Now what did you do on page 3?

A. Page 3 I made a computation of tax based on income computed on the net worth method, which is page 2 of government's Exhibit 34.

Q. How much tax did you find due for the year

(Testimony of Forrest P. Calkins.)

1948 on the net worth method? A. \$2,239.84.

Q. And again the income taxable on the return was zero and understatement of tax, \$12,239.84?

A. Yes, sir.

Q. And on page 4?

A. Page 4 I made a computation of tax on net income as computed on the net worth method for the year 1949.

Q. Similar computation as you made previously?

A. Yes, sir. Corrected income tax for the year 1949 was \$589.34.

Q. And income tax per return? A. Zero.

Q. And the understatement of tax?

A. \$589.34.

Mr. Maxwell: We have no further questions.

(Jury admonished and recess taken at 3:00 for 15 minutes.) [287]

3:15 P.M.

Defendant present with counsel and government counsel present. Presence of the jury stipulated.

The Court: Proceed with the cross-examination.

Mr. Maxwell: May copies of the exhibits be returned to the jurors?

Mr. Puccinelli: Yes.

MR. CALKINS

resumes the witness stand on:

Cross-Examination

By Mr. Puccinelli:

Mr. Puccinelli: Mr. Calkins, because I am not a tax expert, I am going to question from a seated position by my accountant. It is not intended as a reflection on you whatsoever, and I trust that you and the jury will accept it as such.

The Court: I might say further so the jury, we all know these are rather technical matters and counsel need the suggestion of technical men; and by sitting at the counsel table, it gives counsel an opportunity to consult with expert witnesses, as government counsel have here.

Q. Mr. Calkins, I refer you, first of all, to your computation, being plaintiff's Exhibit 34, and we will confine ourselves to that, for this portion of the cross-examination at least. Now, under item 2, which takes into consideration your Schedules I and J—— A. Yes, sir. [288]

Q. I will take Schedule I first. The item there with reference to living expenses, \$3,000.

A. Yes, sir.

Q. Now, having that figure in mind, and that schedule, I refer you to schedule E, which is the computation of withdrawals from the First State Bank at Rangely. A. Yes, sir.

Q. The next to the last line there, which reads, "Personal Expenditures, \$150." A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. Is that taken into consideration in the item on Schedule I of living expenses?

A. It is in this way; in that the testimony I heard yesterday reflects the taxpayer has living expenses of \$3,000. We have nothing else that was heard or seen in this trial showing what that \$3,000 is comprised of. This \$150, I did not see the check myself, as I don't know whether it was cash or what was its position. I reduced it in Schedule E, or figured out of the total withdrawals, in an attempt to arrive at the particular figure, which I call deductible withdrawals allowable against income, in arriving at the adjusted gross income.

Q. As I understand it, then, on Schedule I that sum of \$3,000 as entered there could be \$2,850?

A. Yes; it could; yes, sir.

Q. Now, I refer you to the item listed under 5(b), which is the interest paid Joe Rosa, and I refer you to Schedule B, which is [289] on page 4.

A. Yes, sir.

Q. I will give you what is marked plaintiff's Exhibit 20 in evidence, which is the Joe Rosa note.

A. Yes, sir.

Q. I refer you to line 15 on that exhibit, which starts 12-1-48; and would you read that out loud, please? I am referring to Exhibit 20 in evidence.

A. Starts out 12-1-48—"As per parties' agreement, the principal balance due this date is \$28,-373.00 with interest paid 11-5-48."

Q. Now, will you read the line immediately above that entry?

(Testimony of Forrest P. Calkins.)

A. "November 23, 1948," in column Paid on Interest; ditto marks, column Paid on Principal. Paid on principal, \$1,250. Interest paid, interest due column is blank; amount paid column, \$1,250. Balance of principal column, \$27,250; and the final column, received by, initials J. R.

Q. What do those two lines mean?

Mr. Maxwell: Well, your Honor, I believe the document speaks for itself.

Mr. Puccinelli: Well, your Honor, the schedules speak for themselves, but he was allowed expenses. What that was, I think I know; but I want the jury to know.

Mr. Maxwell: From an accounting standpoint?

Mr. Puccinelli: Yes.

Mr. Maxwell: I have no objection to that at all. [290]

The Court: Very well. You asked what do those two items mean?

Q. Yes; primarily the two ending balances. What that means, I mean the difference?

A. It would indicate to me that apparently too much interest had been charged and not enough had been applied to the principal payments up to and including that date. In other words, we have a balance, as of November 23, 1948, after payment was received, of \$27,250; and the notation here says by agreement of parties, balance as of this date, or 12-1-48, \$28,737.

Q. Could it also mean, Mr. Calkins, that interest could have been added to the face value of the note?

(Testimony of Forrest P. Calkins.)

A. I wouldn't say so, from the wording here; no, sir.

Q. I will refer you then, back to the first page of your Exhibit 34, the item 5-E-1.

A. Bank withdrawals from the First State Bank of Rangely; yes, sir.

Q. Now, referring to your Schedule E, and at the same time referring to Schedule B, reading first then on Schedule B, which is entitled, "Joe Rosa Note," going down to the fifth line in the body of it, it says, "Payment applied on Principal, \$22,-047.47." A. Yes, sir.

Q. Now, keeping that in mind, and going to Schedule E, under Non-Deductible Withdrawals, the first item under that, "Payments on Loan to Joe Rosa, \$21,015." [291] A. Yes, sir.

Q. That makes a difference of \$1,032.48?

A. It is approximately that; yes.

Q. Why is that difference?

A. The difference being that all the payments I tried to trace back from Exhibit 20 apparently were not paid by check were paid through the bank account at Rangely. The only items I took into account in Schedule E are those represented by payments through the bank account.

Q. Now, Mr. Calkins, on the front page of the computation, again being Exhibit 34, under 5-G-2, I notice the depreciation for 1948, \$4,394.50, and for 1949, \$3,100. A. Yes, sir.

Q. Can you explain why the difference in those two years?

(Testimony of Forrest P. Calkins.)

A. The depreciation I took as shown on income tax returns filed. I had no basis for charging that without seeing the property.

Q. I see. I think I will have to refer back to a previous question with reference to the note, when I asked you to read that Joe Rosa note. If that difference reflected there on those two items were actually interest added to the face of the note, would that amount, the difference, would that amount be under non-cash outlay expense?

Mr. Maxwell: I don't understand the question. If the witness does, he may answer; but I certainly don't.

Q. In other words, you will recall, Mr. Calkins, you read from plaintiff's Exhibit 20, that one line, in which parties agreed [292] the principal balance due this date is \$28,737. A. Yes, sir.

Q. And then the previous entry for November 23, 1948, was \$27,250. A. Yes, sir.

Q. As I compute, the difference is \$1,487. If that were interest added to the face value of the note, would that interest be under non-cash outlay expense?

Mr. Maxwell: May it please the Court, I think the witness has already answered the question, that he said those could mean——

Mr. Puccinelli: I asked him if that was the case.

The Court: Counsel is asking, I assume, a question based on that, and if the question is intelligible——

(Testimony of Forrest P. Calkins.)

Q. Is it intelligible?

A. I am not quite sure. I might clear it up if I asked a question. I am wondering if——

Q. Well, let's assume, for the purpose of the answer, assume that the difference is interest added to the face value of the note.

Mr. Maxwell: What difference?

Mr. Puccinelli: \$1,487.

Mr. Maxwell: Between what?

Mr. Puccinelli: Those two items, \$1,487.

Mr. Maxwell. If the witness understands the question, I am perfectly satisfied to have him [293] answer.

The Court: He will take care of it himself.

Mr. Brown: Is that fact in evidence?

Mr. Puccinelli: It is on Exhibit 6 in evidence. That entry hasn't been described as to what it is exactly. It could be one of three different things.

Mr. Brown: We have no objection.

A. You mean interest previously had been paid at this time but included and added to the note——

Q. To the note instead of interest, which is added to the face value of the note?

A. Taking this into consideration, the note on there, I would say no.

Q. May I ask you a hypothetical question? Let's assume that I get a thousand dollars on a note carrying six per cent interest. At the end of the year I haven't paid the interest, which I would figure to be \$60. So, then that note is cancelled and

(Testimony of Forrest P. Calkins.)

a new note made for \$1,060. Is then that \$60 a non-cash outlay expense?

Mr. Maxwell: I believe that question is objectionable, based on facts not in evidence.

Mr. Puccinelli: The analogy is there on those exhibits in evidence. Those items are there, if your Honor please, and haven't been described.

The Court: I can answer that in my way. It seems to me obvious that one note is given for another. This is a new note, and start there.

Mr. Maxwell: Your Honor, I do not believe there was a [294] new note. We have the same note.

Q. We have this same one thousand dollar note to which I referred. I do not pay interest at the end of the year, so on the same note we would then owe \$1,060. Would that \$60 interest be a non-cash outlay expense?

A. Not on the net worth basis. It would increase the liability and carry that note at \$1,060 rather than a thousand. On your expenditures it would have no bearing, in that on a cash basis you would not pay that and you would not be entitled to deduction and you would make no adjustment.

Q. Do you have plaintiff's Exhibits 1 and 2?

A. The returns?

Q. Yes. A. Yes; I have.

Q. Do you have those handy? Now, referring to line 9 of your computation, which is plaintiff's Exhibit 34, you have the net income per returns filed under the column 1948, \$7,087.03, which is a loss. A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. Now, will you refer then to plaintiff's Exhibit No. 1; is that 1948?

A. We have two 1948 returns.

Q. Refer to both of them. A. Yes, sir.

Q. In the schedule appearing on page 2—just explain this, just [295] explain how you arrived at the figure \$7,087.03, listed under the 1948 column, in line 9 of your computation.

A. Two returns were filed, one showing operation of the Ace High in Rangely, Colorado, the other showing the operations of the Nevada Club at Wendover, Nevada.

Q. Will you read what the loss was, with reference to the Nevada Club?

A. The Nevada Club showed a net loss on page 2, Schedule C of the return of \$6,751.37.

Q. What was the same result for the operation of the Ace High Club?

A. Page 2, Schedule C of the return for 1948, showing Ace High activities, showed a net loss of \$335.66.

Q. Is that a net loss? A. No, sir; it is not.

Q. It is a net profit? A. Yes, sir.

Q. Will you read the figure again?

A. \$335.66. Schedule shows \$336.66.

Q. Does that make a difference in your computation?

A. It will make a difference in line 10, understatement of net income, of approximately \$670. It would not make a difference in computation for 1949.

(Testimony of Forrest P. Calkins.)

Q. It would for 1948? A. Yes, sir.

Q. That was approximately \$670? [296]

A. It would be just double the \$335.66.

Q. And is that to the defendant's benefit, or whose benefit; the error that you have made?

A. The error I made is in favor of the government.

Q. Referring then again to page 1 of your computation, which is plaintiff's Exhibit 34, in figuring the computation for the year 1949, you heard the testimony, yesterday, of Blake Craft, I take it?

A. Yes.

Q. And he testified there was \$600 due him as of December 31, 1949? A. Yes, sir.

Q. Which Mr. Craft stated was reported by Mr. Percifield and social Security had been paid on it. Do you recall that testimony, yesterday?

A. As I understood it, his testimony was that social security had been paid on it, that he had reported it as income on his return.

Q. That he had reported it as income on his return? A. That was my understanding.

Q. Have you taken that into consideration for the year 1949? A. No.

Q. And that amount was \$600 for the year 1949, as testified by Mr. Craft?

A. I think it was vague. It was approximately \$600.

Q. Now, if you will turn to page 2 of your computation. This is [297] computation of net income under net worth method? A. Yes, sir.

(Testimony of Forrest P. Calkins.)

Q. I think you stated to one of the final questions asked you by Mr. Maxwell that you took all your figures in the most favorable light to the defendant from the exhibits in evidence?

Mr. Maxwell: —

Mr. Puccinelli: Wait a minute—the returns as filed in evidence; yes.

Mr. Maxwell: I object. I asked no such question. I will ask the reporter to read the question.

The Court: You will never find it. Ask the witness what he said.

Q. Do you recall?

A. Will you repeat that again?

Q. My question was, I thought one of the last questions asked by Mr. Maxwell that you had, in figuring your computations taken your figures from exhibits in evidence and from testimony adduced up to this point? A. Yes.

Q. And that further, in regard to the income tax returns, you had used the figures there in the most favorable light to the defendant.

A. I don't recall reference to that.

Q. That is what I understand. Would that be your testimony now?

A. Took the figures from the income tax return most favorable?

Q. Yes. In other words, did you try to get the figures most [298] favorable to the government or most favorable to the defendant?

A. I tried to get the figures I thought were correct.

(Testimony of Forrest P. Calkins.)

Q. Assuming that you got them out of the evidence—I don't mean that you fabricated—

Mr. Brown: I think the witness has answered the question, your Honor.

Mr. Puccinelli: There again is our difference of understanding. I am sure he has not.

The Court: Well, counsel, you will be given an opportunity to search the record and find out to your satisfaction. Do you want to check with the reporter now?

Mr. Puccinelli: I would like to, please. We will dispense with that for the moment, in the interest of getting along.

Q. Referring to line 1-G of the computation on the Ace High Club, you show there \$66,500.

A. Yes, sir.

Q. On all three columns? A. Yes, sir.

Q. If you will refer to the income tax return again and the depreciation schedule on the return for the Ace High Club for the year 1948—

Mr. Maxwell: Counsel, is your question directed to the figure all the way across? If so, I think the witness should also look at the 1949 return. [299]

Mr. Puccinelli: Let us confine ourselves to 1948 for this moment. Will you look at the depreciation schedule for the year 1948?

A. Yes; on attached schedule.

Q. What is that figure?

A. Depreciation, a total of four thousand.

Q. And what is the cost value of the buildings?

(Testimony of Forrest P. Calkins.)

A. Fifty thousand dollars.

Q. And the furniture and fixtures?

A. \$18,945.28.

Q. Now what does your figure of \$66,500, in your column 12-31-48; what does that figure reflect?

A. That reflects the total cost to the taxpayer of everything with the exception of inventory, including land, building, furniture and fixtures and everything else that was on the place.

Q. And what is it in the income tax return?

A. The building is broken down by building and furniture and showed \$50,000 for the building and \$18,945.28 for the furniture.

Q. And the total? A. \$68,945.28.

Q. Roughly, how much is the difference between the one in the income tax return and the one in your schedule? A. It would be about \$2,500.

Q. You have then reduced the basis of cost from that indicated in the income tax return? [300]

A. Well, it works both ways; yes, sir. What I did was to take \$70,000 already testified by Mr. Rosa, which he testified included \$3,500 inventory, which charge would not properly be included in the cost of the club itself, and there was no further breakdown in evidence.

Q. Will you refer to the return for 1949, to the Ace High Club; and what is the total figure there of the depreciation item?

A. Total cost figure under depreciation item for building and furniture and fixtures is \$68,500.

(Testimony of Forrest P. Calkins.)

Q. And therefore in your computation for 1949 you reduced that figure again?

A. Well, as I said before, my figure is based on testimony of Mr. Rosa.

Q. I mean you have reduced it from that joint return?

A. Yes; it is reduced.

Q. Now, on your schedule of the net worth computation, referring to line 1-H under Gambling Equipment Ace High Club.

A. Yes, sir.

Q. Under the final column, 12-31-49, you have listed \$511.30.

A. Yes, sir.

Q. From the evidence which has been adduced thus far, how would you state that you know that this was not a deductible expense?

A. I believe the witness testified to that, testified that it was gambling equipment of one form or another.

Q. I show you what has been marked plaintiff's Exhibit 26 and [301] Exhibit 27 in evidence, which are the invoices from the Salt Lake Card Company, and ask you if you remember when those exhibits were introduced in evidence?

A. Yes, sir.

Q. And will you read what is on the face of those two exhibits? Just to make it shorter, just generally what is included on those?

A. On government's Exhibit 26, blackjack layout, crap layout, giving the dimensions. Do you want that too?

Q. No. How much money was involved?

A. \$152.50.

Q. Do you know what a crap layout is, Mr. Calkins?

A. Yes; the felt cloth.

(Testimony of Forrest P. Calkins.)

Q. Now, will you read generally what is on the other exhibit?

A. On government's Exhibit No. 27, we have four different orders of square edge crap chips.

Q. Do you know what those are?

A. Those are—they are what are referred to as chips.

Q. That's right. Aren't those deductible items? Couldn't they be replacing other items?

A. They could be replacing them; yes, sir.

Q. And as such, wouldn't they be deductible?

A. Depending on how they would be handled. It could be considered as a deductible item.

Q. Now, referring again to the computation of the net worth method, item 1-K, automobile, the figure appearing in the column [302] under the heading 12-31-49. A. Yes, sir.

Q. And the amount appearing there is \$3,461.87. I think that would be the cost price of the automobile. A. Yes, sir; that is total cost price.

Q. I show you what is marked defendant's Exhibit A, which purports to be a car invoice, I believe, for that car. What is the cost amount of that car, as reflected by that invoice?

A. It reflects sold for cash price \$3,109.08.

Q. And that is less than the amount shown in your column, the figures I just read, of \$3,461.87?

A. Yes; it is; but this does not include the time charges.

Q. Aren't there deductible expense items in those time charges?

(Testimony of Forrest P. Calkins.)

A. As I recall that exhibit—if I could see it, please—there was no breakdown that we could determine what was charges, what was interest and what was service charge.

Q. I believe you referred to plaintiff's Exhibit 19 in evidence, and that is the car on the GMAC record? A. Yes, sir.

Q. I want you to read the bottom line on plaintiff's Exhibit 19.

A. Bottom line, government's Exhibit 19 is boxed off, the first box being amount contract \$2,413.62, amount of check, zero, account \$2,051.75. Figure under that looks like 8-13 ter. amt. amount \$135 32-4-(5). N.R. Res-39 8-100 part cut off here looks like 3006; deal res 39-40 part disc. 34. [303] Finance charges 32-1, 157.41 inserted. Estimated value new. Equity pt. 1240; branch No. 74.

Q. Now, does that breakdown show anything to you, showing the finance charges, interest and other matters charged besides the initial cost of the automobile itself?

A. Yes, sir; it does. I would say that the little box listed "Finance Charge" looks like \$157.41. There is no breakdown on here, showing what is breakdown for interest for any period of time.

Q. Therefore, on the basis of that, inasmuch as you do have some interest already in evidence, could that figure appearing on line 1-K of the net worth method of \$3,146.87 have been reduced?

A. Could it be reduced?

Q. Yes.

(Testimony of Forrest P. Calkins.)

A. If we could determine a portion of that was actual interest and deductible; yes, sir.

Q. It could have been?

A. I would like to correct it. No; at that point it would not be deductible; no, sir.

Q. Why?

A. Because that is the over-all cost of that car. It is money he has invested in that car.

Q. Do I understand you to mean that interest is included in the cost of the car?

A. If the finance charges include interest; [304] yes.

Q. Referring to the computation of the net worth method on III-D-2, loss on trade-in on Buick of \$1,790.20. A. Yes, sir.

Q. Under the column, 12-31-49. A. Yes, sir.

Q. Why has this figure been added?

A. Because that was asset dropped out during the period 12-31-48 to 12-31-49.

Q. May I have your answer again?

A. I was still answering. The asset was dropped from the balance here between the end of 1948 and the end of 1949. The tax payer sustained that loss of that amount. It is deductible loss.

Q. Why?

A. It was a sale, or trade-in, which is substantially the same, of a personal automobile.

Q. Has there been any evidence adduced that you can recall that has definitely stated this to be an asset, personal item?

A. In a negative way, in that I have not heard

(Testimony of Forrest P. Calkins.)

any evidence that he used the car in his trade or business.

Q. Will you refer, once again, to the income tax return for 1948 on the Ace High Club? I believe that is plaintiff's Exhibit 2. Am I correct?

A. That is Exhibit 1.

Q. I refer you to the schedule under profit and loss statement in that return. [305]

A. Yes, sir.

Q. Under the heading of "Other Business Expenses," five items up from the bottom of that group, listed "Travel Expenses for Business."

A. Yes, sir.

Q. What is the amount of that travel expense?

A. \$882.25.

Q. Would that indicate to you that that car was used partly for business purposes?

A. I don't interpret it so, sir.

Q. But it could be?

A. It could be; yes. It could be for all types of travel, too.

Q. If it were, then what is the figure of \$1,790.20 appearing on computation of computation of net worth method on III-D-2; \$1,790.20, would that be loss?

Mr. Maxwell: Objected to as assuming something not in evidence.

Mr. Puccinelli: Your Honor please, we are trying to arrive at the basis of things, here.

Mr. Brown: The question was, if it were.

Mr. Puccinelli: It wasn't proven that it was not, and he said it could be.

(Testimony of Forrest P. Calkins.)

The Court: Objection overruled.

Q. Would that \$1,790.20 then be a loss?

A. It would be reduced proportionately between the use of the automobile for business and the use of the automobile for personal [306] or pleasure, if the car was used in a business way.

Q. And as so reduced, that would also reduce the tax liability for that year? Actually would reduce the net income? A. Yes, sir.

Q. Now, you recall, Mr. Calkins, that we were discussing the computation under deposit and expenditure method with reference to the net income in the return filed, being the amount of \$7,087.03 under 1948? A. Yes, sir.

Q. And you stated you made a \$670 mistake there? A. Yes, sir.

Q. Would that same mistake appear under the net worth method, or approximately the same amount? I refer you specifically to Item 14.

A. Yes; it would, because I carried the same figure.

Q. And would the error be for the same amount?

A. Yes, sir.

Q. Amount in favor of the government?

A. As to line 5?

Q. Yes. Do you have plaintiff's Exhibit 30 there, Mr. Calkins? Mr. Calkins, in your direct testimony, did you refer to some accounts payable?

A. Accounts of notes payable; yes, sir.

Q. At the beginning of your testimony, I believe

(Testimony of Forrest P. Calkins.)

you said there were some accounts payable in the records? A. Yes, sir. [307]

Q. And were you referring to those items appearing on plaintiff's Exhibit 30?

Mr. Maxwell: I suggest you show the witness the exhibit.

Q. In your reference to the two accounts payable, were you referring to the accounts payable appearing in that Exhibit 30, plaintiff's Exhibit 30?

A. Yes, sir; I think I was.

Q. Is there an accounts payable column in this record?

A. Accounts payable column; yes, sir.

Q. Will you read the amount? Will you read the whole item, as a matter of fact, that is on that line of that column?

A. January 8, City of Rangely, check 122, 1-8 deposited, \$400.30. Credit \$650 spread over to accounts payable; \$325 carried over to taxes, license, insurance, charge \$325.

Q. I take it then there was an entry in your record of the accounts payable paid by check in that amount of \$325, which you just read?

A. Yes, sir.

Q. Then was that taken into consideration in your computation? A. That particular item?

Q. Yes. Any and all other similar assets, if there was any?

Mr. Maxwell: May the witness look over the record to find out if there was?

(Testimony of Forrest P. Calkins.)

Mr. Puccinelli: Yes; I refer you to the very next page under the column, the same column, headed "Accounts Payable." [308] Are there any items appearing there?

A. Item \$16.32; Item \$182.56.

Q. Are those paid by check, as reflected by those records? A. Yes, sir; they were.

Q. I can repeat the question, if you want to go through the rest of the records to see if there are any other accounts payable paid by check.

A. If I may answer in this way, sir—if they were paid by check and cleared the bank, they were taken into account; yes.

Q. How; that is what I want to know.

A. Through my computations on schedules E and F, computing the bank withdrawals. I took into consideration all withdrawals from the bank. There wasn't a complete and accurate record of all checks. No charges against that account have been taken into consideration.

Mr. Maxwell: By this you mean Exhibit 30?

A. Yes, sir.

Q. Does the fact that payments by check on accounts payable had been made, have anything to do with your arriving at your thought that the books were kept on a cash basis?

A. I gave thought to it. It was apparent to me that the books were actually, and returns actually were, prepared on a cash basis.

Q. I have just one question with reference to plaintiff's Exhibit 35, which is computation of tax on the expenditure method. Just one question and

(Testimony of Forrest P. Calkins.)

only one in passing the exhibit to the jury. [309]

Mr. Maxwell: Perfectly all right.

Q. Mr. Calkins, in computing the tax, as reflected by your computation of tax for the year 1948, did you take into consideration the operating loss for the year 1947 and carry it forward to 1948?

Mr. Maxwell: I will object on the ground that that certainly assumes something that is not in evidence. In any event, it is immaterial, and irrelevant and has nothing to do with the issues before this court.

The Court: The answer is yes or no. The witness may answer.

A. Would you read that back please?

(Question read.)

A. No, sir, I did not.

Mr. Puccinelli: That is all.

Redirect Examination

By Mr. Maxwell:

Q. You were questioned, sir, about that automobile cost and the amount of interest. I will show you Defendant's Exhibit B, and Defendant's Exhibit B shows the total price for the automobile, is that correct? A. Yes, sir.

Q. And what is that amount shown on that exhibit? A. Total price \$3,461.87.

Q. Is that the same thing as shown in your computation on net worth?

(Testimony of Forrest P. Calkins.)

A. Yes, sir, it is. [310]

Q. Now does that set out the amount what Defendant's Exhibit B sets out, the amount of monthly payments?

A. Yes, sir.

Q. How much was that? A. \$134.09.

Q. Does it show in Defendant's Exhibit B what amount of interest is included in the monthly payment?

A. No, sir, it does not.

Q. In 1949, what was the law with respect to payments on time contracts?

Mr. Puccinelli: I think——

Mr. Maxwell: I will withdraw that and reframe the question.

Q. In 1949 was a deduction permitted for a portion of the payment on a time contract, where no segregation was made between interest and the finance charges and principal?

A. No.

Mr. Puccinelli: I think I have the same objection, testifying as to the law.

The Court: I assume he only testified as to what his practice was in connection with that situation.

Mr. Maxwell: Yes, your Honor.

The Court: That is the thought we are trying to get over. Objection overruled.

Q. Was any deduction allowed?

A. No, sir. [311]

Q. Now on your net worth schedule, I will refer you to item I-G, Ace High Club, in amount of \$66,500?

A. Yes, sir.

Q. That is the same figure at the beginning of 1948, the end of 1948 and the end of 1949, is it not?

(Testimony of Forrest P. Calkins.)

A. Yes, sir, it is.

Q. Would it make any difference in your computations if you used the figure shown on the return on the depreciation schedule of \$68,945.28?

A. Not if it carried through all years.

Q. Does depreciation schedule carry amount for loss on the return for 1948?

A. No, sir, it does not.

Q. Do you remember Mr. Rosa's testimony, as to whether just buildings and equipment were sold to Mr. Percifield, or was it land, buildings and equipment?

A. It was land, building and equipment.

Q. And does your item here, \$66,500, also include land? A. Yes, sir, it does.

Q. Is land depreciable? A. No, sir.

Q. Can I claim a deduction for depreciation on land? A. No, sir, you can not.

Mr. Maxwell: I think that is all. [312]

Recross-Examination

By Mr. Puccinelli:

Q. You heard the testimony, I think, in regard to the type of town Rangely was? A. Yes.

Q. And how in 1945 it was very very small, if I correctly recall?

Mr. Maxwell: Objected to as not within the scope, not bearing on what the witness testified to.

The Court: Objection sustained. This witness is

(Testimony of Forrest P. Calkins.)

not qualified to testify as to Rangely, or any other town, as a matter of fact.

Q. You did, however, Mr. Calkins, use a different figure in your computation on depreciation schedule than the depreciation schedule appearing in the income tax returns?

Mr. Maxwell: Your Honor, the testimony has been quite the contrary.

Mr. Puccinelli: It has?

Q. You used \$66,500, did you not?

A. I made no computation on depreciation, sir.

Q. I mean in using that figure.

A. The asset column.

Q. And the figure as used in the income tax return is more than \$66,500?

A. Yes, sir, it is.

Mr. Puccinelli: That is all. [313]

Redirect Examination

By Mr. Maxwell:

Well, may it please the Court, I have two questions.

Q. Would it make any difference on your net worth figure what figure you used?

Mr. Puccinelli: Objected to as asked and answered.

The Court: Objection overruled.

A. No, sir. It would make no difference what amount is used, so far as the increase or decrease of net worth.

(Testimony of Forrest P. Calkins.)

Q. Or as far as computation of income?

A. Yes, sir.

Mr. Maxwell: That is all.

(Witness excused.)

The Court: Any further witnesses?

Mr. Brown: The government rests.

Mr. Puccinelli: I would like the record to show that I collected the computations from the jury.

Mr. Maxwell: May the computations be given to the clerk, in case they may be needed at some future date.

The Court: Yes, Mr. Clerk, will you take possession of these computations.

(Jury admonished and recess taken at 4:30 p.m. until Monday morning.) [314]

February 20, 1956—10:00 A.M.

The Court: Let the record show the presence of the defendant in court with counsel and the presence of counsel for the government. The record will show that the Court, being advised by defendant's counsel that they propose to make a motion for acquittal under Rule 29 at this time, the Court has been convened without the jury being present.

(Motion for acquittal argued.)

The Court: The defendant's motion for, acquittal, made under Rule 29, is denied.

11:20 A.M.

(Defendant present in court with counsel and government counsel present. Presence of the jury stipulated, with exception of juror Mrs. Maude Taylor, who was absent due to death in the family. Alternate juror took place in jury box of Mrs. Taylor, on stipulation of counsel.)

The Court: I believe that as of the time of adjournment Friday last, the government had rested its case and the defendant had asked for a recess at that time that it might prepare its case. Are you ready to proceed, gentlemen?

Mr. Puccinelli: Your Honor please, the defense rests.

Mr. Anderson: I don't know whether it is necessary [315] or not, may it please the Court, we would like the record to show any motion necessary at the close of all the evidence. We would like to show that.

The Court: The record shows that defendant's counsel made and argued a motion for acquittal this morning, which, after argument, by defendant's counsel and government's counsel, was denied by the Court. The defendant's counsel has elected not to put on any evidence and you requested now, as I understand it, Mr. Anderson, that you desire for the record now to have your motion for acquittal renewed.

Mr. Anderson: Yes, your Honor.

Mr. Brown: We move that this matter be considered out of the presence of the jury, your Honor.

The Court: Well, there is no further matter, I can see. It is all over. The Court makes the same ruling as before the recess. Now defendant's counsel have asked for further time for the purpose of preparing instructions and I think we should recess for that purpose.

(Jury admonished and recess taken at 11:30 until 2:00 p.m.)

February 20, 1956—2:00 P.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.) [316]

(Jury admonished and recess taken until 11:00 o'clock February 21, 1956, for further preparation of instructions.)

February 21, 1956—10:00 A.M.

(Defendant present with counsel and government counsel present.)

The Court: Gentlemen, it is understood that we would meet for a few minutes prior to the calling in of the jury, to the end that the Court might pass upon the offered instructions on the part of the government and on the part of the defendant. The Court has prepared a written statement, which sets out its disposition of the plaintiff's instructions being offered and which are numbered from 1 to 36, and has also stated its disposition of defendant's instructions, lettered A to and including G. Respective counsel have been furnished with copies of the

original, which will be filed at this time. Do you stipulate, gentlemen, that this is sufficient disposition of this particular phase of the case?

Mr. Brown: The government so stipulates, your Honor.

Mr. Anderson: Yes, I think we stipulate also, according to the understanding we had in chambers.

The Court: Let the record further show that these matters which we are now disposing of in open court were discussed at some length in chambers, [317] as counsel has said. The jury will be called in and counsel will proceed with their arguments. After the arguments, the instructions which have been settled by the Court will then be read and the jury will then be excused momentarily to permit counsel to make final objections to the instructions as read. It may be stated here for the record that all of the instructions proposed to be given by the Court have been discussed at length in chambers and the Court now has the benefit of tentative objections and exceptions of counsel to the instructions settled by the Court. Then, as stated by the Court, the record will be made after the instructions have been read.

11:00 A.M.

(Presence of the jury stipulated.)

(Argument by respective counsel.)

(Jury admonished and recess taken at 1:10 until 2:30 p.m.)

February 21, 1956—2:30 P.M.

(Defendant present with counsel and government counsel present. Presence of the jury stipulated.)

The Court: You may say for the record, Mrs. Reporter, that the instructions approved and to be [318] given by the Court are numbers 1 to 58, inclusive, and for the benefit of counsel and the record, we will show that Instructions 18, 36 and 41, as they were originally numbered, have been withdrawn, so those numbers will not be read and for the purpose of permitting counsel to follow, I will read the numbers of the instructions as we go along. [319]

INSTRUCTIONS TO THE JURY

No. 1.

Ladies and Gentlemen of the Jury:

You have heard the testimony of the witnesses, and you have heard the arguments of counsel. It is now my duty to instruct you as to the legal principles which enter the case.

You are the judges of the facts, and that includes the determination by you of the guilt or innocence of the defendant. Where the evidence is conflicting, it is your duty to resolve that conflict and determine what is the truth.

In the performance by you of your duty as judges of the facts, you are not to act arbitrarily. As ours is a government of laws and not of men, you are

governed by rules of law. It is my duty as Judge of this Court to announce these rules of law to you, and it is your duty as jurors to apply the law. You must base your determination of what the facts are upon the evidence introduced in the trial and upon the evidence alone. [320]

No. 2.

There are certain general principles of law to which the Court desires to call your attention.

You will understand that under our system courts and jury have a divided responsibility. It is the duty of the Court to decide all questions of law which may arise during the progress of the trial, and the duty of the jury to pass upon the facts. If the Court is unfortunate enough to make a mistake in deciding those questions of law, there is another court which may be appealed to, to correct those mistakes. It is, therefore, the duty of the jury to take the law as laid down by the Court, because if the jury should undertake to determine what the law is, and should make a mistake, there is no way of remedying it. It is the province of the jury to pass on what the facts of the case are, upon the creditibility of the witnesses, and to apply the law to the facts of the case as they find the facts to be. The Court is just as little inclined to interfere with the province of the jury passing upon the facts of the case, as it is sensitive of having the jury undertake to determine what is the law of the case. With this understanding of our respective duties, the

Court states to you the following general principles. [321]

No. 3

The information itself is a mere charge or accusation against the defendant, and is not of itself any evidence of his guilt, and no juror in this case shall permit himself or herself to be to any extent influenced against the defendant because of or an account of the information. [322]

No. 4

The information in this case charges a violation of Section 145(b) of Title 26, United States Code, which so far as it applies here reads “* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter * * * shall * * * be guilty” of an offense. [323]

Nos. 5 and 6

The information charges the defendant with two offenses or counts as follows:

Count 1: That on or about the 15th day of March, 1949, in the District of Nevada, Raymond Percifield, late of Rangely, Colorado, who during the calendar year of 1948 was married to Mossie Percifield, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue District of Nevada at Reno, Nevada, false and fraudulent joint

income tax returns on behalf of himself and his said wife, wherein it was stated in total that their net income for said calendar year was nil and that they had suffered a net loss for said calendar year of \$6,415.71, and that the amount of tax due and owing thereon was nil, whereas he then and there well knew their joint income for the said calendar year was the sum of \$13,637.78, upon which this joint income there was owing to the United States of America an income tax of \$2,041.92.

Count 2: That on or about the 15th day of March, 1950, in the District of Nevada, Raymond Percifield, late of Rangely, Colorado, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by [324] filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return, where in he stated that this net income for said calendar year was nil, that he had suffered a total net loss of \$3,923.07 for said calendar year and that the amount of tax due and owing thereon was nil, whereas he then and there well knew his net income for the said calendar year was the sum of \$6,372.02, upon which said net income he owed to the United States of America an income tax of \$559.76. [325]

No. 7

To the two charges or counts set forth in the information the defendant, upon his arraignment,

pleaded "not guilty" to each count, thus putting in issue every material allegation contained in each of the two counts in the information, and it therefore becomes necessary for the prosecution to establish each and every one and all such allegations beyond all reasonable doubt. [326]

No. 8

Every person required to pay income taxes is under a personal duty to call, or cause to be filed, for him a proper income tax return. Bona fide mistakes should not be treated as false or fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of good faith as to the correctness of the statement which he signs, whether prepared by him or somebody else. [327 to 329]

No. 9

The defendant has been charged under a statute which applies to "any person who wilfully attempts in any manner to evade or defeat any tax imposed," etc. With respect to the meaning of the phrase "in any manner," I charge that Congress did not define or limit the methods by which a wilful attempt to evade and defeat might be accomplished. The information in this case charges attempt to evade taxes by filing false income tax returns. In the event that you determine that the income tax returns for 1948 or 1949, or either of them understated the incomes of the defendant, or his wife,

you must then determine if such understatement was wilful. [329]

No. 10

You are instructed that the defendant is presumed to be innocent and that the presumption of innocence attends him to the end of the trial, or until the verdict is reached, and will prevail, unless it is overcome by evidence which convinces the jury beyond a reasonable doubt of his guilt. [330]

No. 11

You are instructed that the rule of law which throws around the defendant the presumption of innocence and requires the government to establish, beyond a reasonable doubt, every material fact averred in the information, is not intended to shield those who are actually guilty from just and merited punishment, but it is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime. [331]

No. 12

A reasonable doubt is one based on reason. It is not mere possible doubt, but it is such doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charges in a count of the information, there is not

a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation. [332]

No. 13

You are to consider only the evidence introduced in this case. A conviction is justified only when such evidence excludes all reasonable doubt, as the same has been defined to you, without it being restated or repeated. You are to understand that the requirements that a defendant's guilt be shown beyond a reasonable doubt should be considered in connection with and as accompanying all the instructions that are given to you. [332-A]

No. 14

To establish its case the government must prove both of the following elements: (1) That substantial income tax was due and owing from the defendant in addition declared in his original income tax returns for the years 1948 and 1948; and (2) that the defendant wilfully attempted to evade and defeat such tax.

The gist of the offense charged in each count of the information is a wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt" as used in this law, involves two elements: (1) an intent to evade or defeat the tax, and (2) some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and

understanding that during each of the calendar years 1948 and 1949 he had an income in each of such years which was taxable, and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar years and which he knew it was his duty to state in his returns for each of such years.

There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the taxes. The one alleged in this information is that of the filing false, fraudulent returns with intent to defeat the tax liabilities. The [333] gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the government. The attempt must be wilful, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendant. [334]

No. 15

You are instructed that an attempt to evade income tax for one year is a separate offense from an attempt to evade for a different year. The information in this case, therefore, charges two separate offenses, the attempt to evade for the year 1948 and the attempt to evade for the year 1949. You may

find the defendant guilty or not guilty on either or both counts. [335]

No. 16

The Court instructs the jury that in every crime or public offense there must exist a union or joint operation of act and intention.

Intention is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused. [336]

No. 17

If you find that a fraudulent return is filed with intent to defeat a part or all of the tax, and that this was done wilfully, the crime is complete as soon as the crime takes place. [337]

No. 19

Wilfully means knowingly, and with a bad heart, and with a bad intent; it means having the purpose to cheat or defraud or doing wrong in connection with a tax matter. It is not enough if all that is shown is that a defendant was stubborn or stupid, careless, or negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books, or if he makes errors of law, or if he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury, or if he acts without the advice of a lawyer or accountant. [338]

No. 20

In a prosecution for evasion of federal income taxes, the taxpayer's wilfullness is an element necessary for conviction; such wilfullness involves a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income, however, such understatement of income, if any, should be viewed with all other acts of the defendant and the surrounding circumstances, and when so viewed wilfullness may be inferred from a combination of the acts and circumstances, although each separate act and circumstance, standing alone, may be inconclusive on the question of wilfullness. [339]

No. 21

The first step in arriving at the income of an individual upon which the tax is imposed is a determination of the gross income of the individual. Gross income is generally all gains or profits and income derived from any source whatever, whether from salaries or wages, from gambling, professions, trades, and businesses, from sales, from dividends, from interest, or from the transactions of any business carried on for gain or profit, except that from such gains and profits there must be excluded under the provisions of the Revenue Acts certain items which would properly be a part of gross income if the statute did not require their exclusion. These items are not pertinent in this case.

After having determined the gross income of an

individual, the next step provided by the statutes for arriving at the income upon which the tax is computed is to deduct, from the so-called gross income such deductions as the statutes permit; that is, an individual is permitted to deduct from gross income all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

After such of these deductions from gross income as the individual is entitled to are made, the amount remaining is the adjusted gross income. In determining net income the taxpayer is permitted to deduct from adjusted gross income either the optional standard deductions fixed by law or the amount paid [340] by him during the year for certain charitable contributions, interest, taxes, medical expenses, casualty losses, and other miscellaneous personal deductions. [341]

No. 22

If you find that there were any gains, profits, or income received by the defendant which were not reported, it makes no difference, as far as the question of taxability is concerned, whether such income was lawfully received or unlawfully received, inasmuch as both were taxable and should have been reported. [342]

No. 23

The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money

may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income. [343]

No. 24

It is not necessary that the government prove an evasion of all the tax charged. It is sufficient if any substantial portion of the tax was attempted to be defeated and evaded as charged in that count. [344]

No. 25

To prove that the defendant's return understated his correct income, the government relies upon the bank deposit method. The theory of this method is that if a taxpayer is engaged in an income producing business or calling, and is constantly day by day and month by month depositing money in bank accounts in his name or in accounts under his domination or control, and such deposits do not represent redeposits or transfers and are not attributable to gifts, inheritances or other non-taxable sources, then such deposits represent income; and if the total of such deposits in a given year exceed exemptions and deductions, that income is taxable. The government claims that after eliminating deposits of funds from non-taxable sources, such as gifts, inheritances, prior accumulations, non-taxable proceeds from the liquidation of capital assets, redeposit of withdrawals, and transfers from one account to another, the total of the remaining deposits which in a given

year exceed exemptions and deductions represents the defendant's correct taxable income for that year, the amount he should have reported in his income tax return.

In order to prove that an additional tax is owing, the government must prove beyond a reasonable doubt; (1) that the total bank account, after the elimination of the non-taxable items and allowance of the exemptions and deductions I have previously mentioned, substantially exceed reported income for each year referred to in the information; and (2) that such deposits [345] constitute income to the defendant.

If you find in any year or years that the government has not established that the total bank deposits after the prescribed eliminations and deductions are substantially in excess of the income reported by the defendant in his return for that year, or you have a reasonable doubt that such deposits exceed reported income for that year, you will return a verdict of not guilty as to such count or counts of the information. If you find, on the other hand, beyond a reasonable doubt that such deposits exceed income reported in defendant's tax return for such year or years, you will proceed to inquire whether the government has established that those deposits represented taxable income on which the defendant wilfully attempted to evade or defeat the tax. In this connection, the government must establish beyond a reasonable doubt that the defendant was engaged in an income producing business or activity and that he realized income from such business dur-

ing the period in question in excess of that reported. It is not sufficient that the evidence simply establish excess deposits during the period involved, but it must be shown beyond a reasonable doubt that such excess deposits were made from funds realized as income through an income producing business or activity.

If you find that the bank deposits have been made constantly day by day, week by week or month by month, there would arise the inference that such deposits are consistent with the orderly business practice of depositing current receipts. [346] In other words, if a taxpayer has a business or calling of a remunerative nature and during the taxable years involved he made regular periodic deposits of money in his bank accounts, then there is evidence that he has had income during those years and if the net annual total of such deposits exceeds exemptions and deductions, the balance represents taxable income. [347]

No. 26

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the methods of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

The government is authorized by law, if the books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has been undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

If, at the end of a year, a man owns more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, if it is shown that he did not get it by gift or inheritance or loan, it may be inferred that it was part of taxable income. [348]

No. 27

The government has placed before you evidence relating to the net worth of Raymond and Mossie Percifield at the end of each of the years 1947 to 1949, inclusive. A defendant's net worth for a given year is the difference between his assets and liabilities, and increase in net worth for a year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute a defendant's taxable net income by the net worth method, you should subtract from the increase in net worth for any given year any non-taxable funds received during the year and then add the defendant's non-deductible expenditures for that year which would, of course, include his living expenses and the income taxes paid during the year. These expenditures are added in order to compute net income because they

are not represented in the assets which the defendant has accumulated during the year and they are nondeductible expenses. If you find that the defendant had an increase in net worth for the years 1948 or 1949, and also had a business or calling of a lucrative nature, there is evidence that the defendant had net income for that year and if the amount exceeds exemptions and deductions, then that income is taxable. [349]

No. 28

Every person, except wage earners and farmers, liable to pay income tax is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits, and other matters required to be shown in any income tax return. [350]

No. 29

As previously stated to you, the income tax law provides that the net income of the taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer. In this case two methods of recording transactions in books of accounts have been referred to, one referred to as the cash method and the other as the accrual method. Under the cash method income is recorded as of the time it is actually received and expenses are included only when actually paid. Under the accrual method of recording transactions income is set up when the right to receive the money arises and expenses are set up at the time the liability is incurred. [351]

No. 30

Where a taxpayer's records are inadequate or inaccurate in substantial respect, it is proper to determine taxable income (1) by the net worth and expenditures method, (2) or by the bank deposits and cash expenditures method, (3) or both.

Of course, the government does not have to prove the exact amounts of unreported income. To require a meticulous degree of proof in a case of the present sort would be tantamount to holding that skillful concealment is an invincible barrier to proof. [352]

No. 31

The question of intent is a matter for you, as jurors, to determine and, as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances what the intent of the defendant was at the time in question. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inference may arise from a combination of acts, although each act standing by itself may be unimportant. These are questions of fact to be determined from all the circumstances. [353]

No. 32

In determining what the defendant's intent was, you may take into consideration any evidence you find of the concealment of tax by the defendant.

No. 33

On the question of intent to evade income taxes, there are certain matters which you may consider as pointing to intent if you find that they exist in this case. These are general illustrations: making false entries in the books, destruction of books, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records, and any conduct the likelihood of which would be to mislead or conceal. I give you these instances simply to illustrate the type of conduct from which you may infer intent to evade taxes. And if the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose. [355]

No. 34

You may find evidence of an intent to commit the crime of attempting to evade and defeat the payment of a tax, even though there is coupled with that intent the desire to suppress information as to acts which are criminal in other ways. Thus, even if you should find that the defendant desired to conceal his receipts of money from any one, you may also find in addition to such motive the existence of an intent to defraud the United States of monies

due as income taxes and to attempt to defeat or evade such taxes. [356]

No. 35

You are instructed that the defendant in this case is being tried upon the charges named in the information and no other charges. If you suspect or believe from the evidence that some offense or misconduct or crime not mentioned in the information was committed by the defendant, but so believing, you nevertheless entertain a reasonable doubt as to whether such defendant committed the particular offense charged against him in the information herein, you will resolve that doubt in favor of the defendant and return a verdict of "not guilty."

No. 37

You are instructed that in determining what a defendant's intent was at the time he filed his income tax returns, you may take into consideration, if you find it to be the fact, that such defendant made false and contradictory statements on material matters to the examining officers of the Bureau of Internal Revenue during the course of the investigation. [358]

No. 38

In this case you are instructed that you should not infer evil motive because of the failure of the defendant, if any, to make a full and complete disclosure to the government agents when asked as to his financial transactions; however, you may consider such failure, if you find any, together with all

other acts and circumstances in determining the intent of the defendant. [359]

No. 39

You are instructed that the filing of a return by defendant which underestimates his true income is unlawful only if made wilfully, with knowledge of its falseness and with intent to evade income taxes and there is no presumption that may be drawn from the act itself, and both knowledge and wilfulness must be established by independent proof direct or circumstantial. [360]

No. 41

In offering proof that the defendant attempted to defeat and evade income taxes by filing false returns, the government is not limited to a single mode of proof. In the present case the government has sought to show that the defendant has substantial unreported income (1) by the bank deposits and cash expenditures method and (2) also by the net worth and cash expenditures method. It is for you to determine whether the government has proven fraud but for the government to prevail on this issue it is not necessary that it establish fraud by both methods. It is sufficient to establish that part of the government's case, if you find that fraud has been proved by either method. [361]

No. 42

There have been admitted in evidence certain exhibits variously referred to as schedules or sum-

maries. Strictly speaking, these exhibits are not actually evidence, but they were admitted as summaries of other evidence in the case and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents already in evidence, in order to assist you in determining the ultimate facts or results shown by such books, records or documents. But you are reminded it is the books, records and documents which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For that purpose you are entitled to consider them. [362]

No. 43

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound. [363]

No. 44

You have heard expert testimony relating to the issues involved in this case. I charge you that the computations made by an expert are for the convenience of both sides in presenting the case for your consideration. You are not bound by the computations or other testimony of an expert witness. but you should give such testimony the weight to which you determine it is entitled in the light of the other proof in the case and also with reference to your conclusions as to whether or not the facts, on which the particular expert's testimony was based, have been established by the necessary degree of proof. [364]

No. 45

Evidence is of two kinds, direct and circumstantial. Direct evidence is that evidence which is given when a witness testifies directly of his own knowledge to the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances from which this jury may infer other and connecting facts, which usually and reasonably follow. Crimes may be proven by circumstantial evidence as well as by direct testimony of eye witnesses; but the facts and circumstances in evidence taken as a whole must be consistent with each other, and with the guilt of the defendant, and inconsistent with any reasonable theory of the defendant's innocence.

In the case of circumstantial evidence it is not necessary that the proof shall be conclusive. It is

sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty, and that they have no reasonable doubt in their minds as to his guilt. If the jury believe the facts as shown by the evidence in this case, as to either count, are all consistent with the supposition that the defendant is guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find the defendant guilty of that count; but if the jury do not so believe, they should find the defendant not guilty of that count. All that can be required is not absolute and positive proof, but such proof as convinces the jury that the [365] crime has been made out against the accused beyond a reasonable doubt.

No. 46

A person charged with an offense against the laws of the United States shall, at his own request but not otherwise, be a competent witness. His failure to make such request and to testify as a witness shall not create any presumption against him; and no juror in this case should permit himself or herself to be to any extent influenced against the defendant because of, or on account of, his failure to testify as a witness in the case. [366]

No. 47

You are the sole judges of the credibility and the weight which is to be given to the testimony of the different witnesses who have testified upon this

trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of a witness' testimony, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the government or the defendant, the manner in which he might be effected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If the jury believe that any witness has wilfully sworn falsely as to any material fact in the case, they may disregard the whole of the evidence of any such witness, except insofar as it is corroborated by other credible evidence.

No. 48

You are instructed that evidence of oral admissions, if any, of the defendant ought to be received with caution. [367]

No. 49

You are instructed, that some evidence has been received as to the character of the defendant. You

will give to this evidence of good character such weight as you think it is entitled to receive and if after a consideration of all the evidence, facts, and circumstances in the case, including the evidence of good character, you have a reasonable doubt as to whether the defendant is guilty or innocent, then it will be your duty to find the defendant not guilty.

No. 50

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your minds as against the declarations of a lesser number or a presumption or other evidence, which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. [368]

No. 51

The Court cautions you to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their agreements, or presentations as to what facts have been or are to be proved. And if there is a variance be-

tween the two, you must, in arriving at your verdict—to the extent that there is such variance—consider only the facts testified to by the witnesses. You will remember at all times that statements of counsel in their arguments or presentations are not evidence in the case. If counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are. [369]

No. 52

At times throughout the trial the Court has been called upon to rule upon certain motions, including the motion of defendant for a judgment of acquittal, and to pass upon whether or not certain offered evidence might be properly admitted. With such rulings and the reasons for them you are not concerned. Whether motions should be granted or denied, and whether the offered evidence is admissible or inadmissible, are purely questions of law, and from a ruling on such questions you are not to draw any inference nor are you to draw any inference as to what weight should be given the evidence or as to the credibility of a witness. In admitting evidence, to which an objection is made, the Court does not determine what weight should be given such evidence. As to any offer of evidence that was rejected by the Court, you, of course, must not consider the same. As to any question to which an objection was sustained, you must not conjecture as

to what the answer might have been or as to the reason for the objection.

Evidence stricken by the Court must be entirely disregarded by you, and you must treat such evidence as if you had never heard or seen it. [370]

No. 53

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it. [371]

No. 54

Some of the principles of law may be repeated more than once. It is my endeavor to illustrate clearly to you different phases of this case. It may be necessary to repeat some portions of these instructions at different times and in different places. You are not, however, to consider these principles of law which may be repeated more than once of any greater importance or of any more binding force upon you than those which are stated only once.

All these instructions are to be considered together. You must not take one instruction and base your verdict upon that instruction alone, you must not take one single sentence and fix your verdict upon that sentence alone, but you are to consider all these instructions as a single charge to you, give the force and effect to every word and every sentence and every instruction. [372]

No. 55

The matter of sympathy is not to enter into your deliberations. Every man who commits a crime is in one sense unfortunate. He is to be pitied, and those who are to share his suffering, and who are innocent, are also to be pitied; but that is one of the almost universal attendants and consequences of crime. Few persons can commit a crime unless some innocent person suffers in consequence. Your sole duty and my sole duty, under our oaths, is to ascertain and determine what the truth is. You are to determine whether a crime has been committed, and whether the evidence offered upon this witness stand satisfied you of the guilt of the defendant beyond a reasonable doubt.

No. 56

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so after a consideration of the case with your fellow jurors, and you should

not hesitate to change an opinion once convinced that it is erroneous. However, you should not be influenced in any way on any questions submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the guilt or innocence of the defendant for the mere purpose of returning a verdict or solely because of the opinion of the [373] other jurors.

No. 57

The duty of counsel and of the Court has now been performed. Counsel have brought to your consideration all the facts and evidence within their reach, which, in their judgment, will assist you in determining the truth. The Court has endeavored to advise and correctly instruct you as to the law, and it now remains for you to perform the last and the most important duty in this trial, to determine the issue of guilt or innocence; and it is with the utmost confidence that I submit this case to you, believing that you will not permit your judgment to be unduly influenced by sympathy, sentiment, or prejudice; that you will consider the law as given to you by the Court, and the evidence introduced during this trial.

The liberty of the defendant is sacred; it cannot be lightly taken away. You cannot bring in a verdict of guilty until the guilt of the accused is proven by the evidence in the case beyond a reasonable doubt. The interests of the government are also im-

portant; its laws are made to be obeyed, and if broken they should be vindicated, and if, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should bring in your verdict accordingly. You must be just to the defendant; you must also be just to the government. Duty demands it, the law [374] demands it, and your oath demands it. As upright men and women, as honest jurors, you are now charged with one of the most solemn and responsible duties of an American citizen, and I trust that you will perform it with an eye to your duty, to your oath, to the law as given you by the Court, and to the evidence in the case.

No. 58

It takes twelve to find a verdict. The clerk, as a matter of convenience, has prepared forms of verdict which will be handed to you.

If you find the defendant guilty of any of said offenses charged in the information, you will insert the word "is" in the blank space before the word "guilty"; if you find the defendant not guilty of any of said charges, you will insert the word "not" in the blank space before the word "guilty." In arriving at your verdicts, you may find the defendant not guilty on both counts or guilty on both counts, not guilty on one count and guilty on the other count, or you may reach a verdict on one count and fail to reach a verdict on the other count.

Upon retiring to your jury room you will select

one of your number to act as your foreman or forelady, and it will be the duty of the one you will select to serve as your spokesman in any further proceedings in this Court.

If it should become necessary for you to communicate with the Court or any matters connected with the case while you are deliberating you should do so through the marshal. Should [375] you desire any of the exhibits introduced in evidence, advise the marshal of that fact and the exhibits you wish to see will be delivered to you in the jury room. I admonish you that during the course of your deliberations you must not disclose to any one, including the Court, how you stand numerically or otherwise upon the questions of the guilt or innocence of the defendant and this admonition you should adhere to until you, as a jury, have reached a verdict. [376]

In Chambers—3:55 P.M.

Defendant present and defendant's counsel and government counsel present.

The Court: Let the record show that, pursuant to statement made in open court, we are meeting in chambers for the purpose of receiving counsels' objections to the instructions as given by the Court to the jury. Let the record show the presence of the defendant and his counsel and counsel for the government, and that the record is being made outside the presence of the jury.

Now, gentlemen, I think we will start with the plaintiff's case, and you can numerically make such objections as you see fit for the record.

Mr. Maxwell: Your Honor please, we accept the instructions as given and we wish to interpose no objections to the instructions as given.

The Court: Let the record so show. Now counsel for the defendant, you make any objections you have is the record as to your instructions, which are 7 in number and labeled A to G. We might let the record show that plaintiff's offered instructions were numbered 1 to 32, inclusive. You may proceed. [377]

Mr. Puccinelli: May it please the Court, we except to the Court's refusal to give defendant's requested instruction B, as it is a correct statement of the law and is not covered by any other instruction given by the Court.

Defendant's Requested Instruction B

You are instructed, ladies and gentlemen of the jury, that proof in this case of the net worth of the defendant on a given date, followed by proof of a greater worth on a later date, does not mean that the difference between the amounts is income.

We except to the Court's refusal to give defendant's requested Instruction C, as it is a correct statement of the law and is not covered by any other instruction of the Court.

Defendant's Requested Instruction C

Ladies and gentlemen of the jury, it is my duty to say to you that the conclusion reached from experience that while the dangers which necessarily

accompany the use of the net worth theory do not foreclose its use, they do require on the part of the Court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach net worth [378] cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused. You are instructed the net worth method may be defined as follows—take all of the assets of the taxpayer on a given date, which would include all tangible property, cash on hand or in bank account, securities, and accounts receivable, from which would be deducted all obligations and liabilities of the taxpayer, then at a later date take a like summary of assets and liabilities and deduct the result thereof from the net worth of the beginning of the period, and the difference could be income but there may be sources which increase net worth that are not taxable and would not be considered income.

We except to Instruction No. 8 as given, because it is not the law it is argumentative and uncertain and irrelevant.

We except to Instruction No. 14, because it is indefinite, misleading and lays down a rule that per-

mits the conviction of the defendant for a felony under Section 145(b) on evidence [379] proving, or tending to prove a misdemeanor under Section 145(a).

We except to Instruction No. 17, because it would permit the conviction of the defendant under Section 145(b) on proof of violation of Section 145(a), and does not require the wilful attempt to evade taxes to be proved by independent evidence.

We except to Instruction No. 20, as it acts to modify defendant's requested Instruction D, in that the modification nullifies the request and by the modification the independent evidence to prove the wilfullness in the request is nullified. In other words, it does not require independent proof of wilfullness.

We except to Instruction No. 26, because it is not a correct statement of the law and is indefinite, confusing and misleading.

We except to Instruction No. 27, because it is not a correct statement of the law, and is indefinite, uncertain and misleading.

We except to Instruction No. 29, because it is not a correct statement of the law and is not adjusted to the evidence in this case and the government proceeded in this case under a hybrid method, and therefore is confusing and misleading.

We except to Instruction No. 37 because it is not adjusted to the evidence in this case, it is misleading and allows the jury to convict on evidence establishing nothing more than a [380] misdemeanor, and is in conflict with other instructions requiring

proof by independent evidence of wilfullness and in conflict with Instruction No. 38.

We except to Instruction No. 38 because it tends to modify defendant's requested Instruction E, since it in effect destroys the full force and effect of the request, and is not adjusted to the evidence in this case as presented, as modified, and is confusing and misleading.

Defendant's Requested Instruction E

In this case you are instructed that you cannot infer evil motive because of the failure of the defendant to make a full and complete disclosure to the government agents when asked as to his financial transactions.

We except to Instruction No. 39, as it modifies defendant's requested Instruction F, since it eliminates therein phrases and words in the law as are contained in defendant's requested Instruction F.

Defendant's Requested Instruction F

You are instructed that the filing of a return by defendant which understates his true income is unlawful only if made wilfully, with knowledge of its falseness and with intent to evade income taxes, and there is no presumption that may be drawn from the act itself, and both knowledge and wilfulness must be established by independent proof.

We except to Instruction No. 19 as given and as modifying defendant's requested Instruction G, as defendant's request correctly stated the law and by

modifying it, renders it conflicting and confusing and indefinite and the modification destroys the force and effect of the request.

Defendant's Requested Instruction G

Wilfully means knowingly, with a bad heart and a bad intent. It means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid or careless, negligent or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. He certainly is not wilful if he acts without the advice of a lawyer or accountant, for there is not requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant.

The Court: Gentlemen, do you stipulate that the proceedings had here and now have the same force and effect as though had in open court?

Mr. Maxwell: So stipulated.

Mr. Puccinelli: So stipulated.

The Court: Let the record show all exceptions denied.

(Jury retired at 4:07 p.m.) [383]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached index, are the originals filed in this Court, or true and correct copies of orders entered on the minutes or dockets of this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of April, 1956.

[Seal] /s/ OLIVER F. PRATT,
Clerk.

[Endorsed]: No. 15119. United States Court of Appeals for the Ninth Circuit. Raymond Percifield, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: April 27, 1956.

Docketed: May 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 15119

RAYMOND PERCIFIELD,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Respondent.

CONCISE STATEMENT OF POINTS

I.

Errors in law occurring upon the trial being prejudicial to the Defendant and Appellant herein, a designation of the errors being, as follows:

(a) Erroneous instructions given to the jury.

(b) Instructions given to the jury taken together gave an incomplete and erroneous statement of the law of the case.

(c) Court's refusal to give requested Defendant's instructions to the jury constituted prejudicial error.

(d) The order of Court made in admitting as evidence Government's Exhibit 32 was erroneous.

(e) The Court made errors in ruling prejudicial to Defendant relating to admission of evidence during testimony of witness, Eleanor Jones, Transcript, Pages 108 through 163.

(f) The Court erred in denying Defendant's motion for directed Verdict and acquittal.

(g) The Court erred in denying Defendant's motion for new trial.

II.

Upon all exhibits received in evidence and upon all evidence adduced by the Government with relation to Defendant's income for the taxable periods covered by the Complaint after allowance of all legal deductions to the Defendant, there is insufficient evidence to establish:

(a) That Defendant received more reportable income than was reported on his returns; or

(b) That any tax deficiency existed; or

(c) Support the Judgment of Conviction.

III.

The expert opinion of the Government's expert witness, Calkins, is not sufficient nor is it supported by admitted evidence to support conclusion of a tax deficiency nor unreported income as to the Defendant.

Respectfully submitted,

/s/ MAURICE J. HINDIN,

Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed May 1, 1956.

